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Ashley Turner
10th Grade

School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

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(512) 463-5561
FAX (512) 463-5569

http://www.sos.state.tx.us
register@sos.state.tx.us

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Open Meetings

Statewide agencies and regional agencies that extend into four or more counties post meeting notices with the Secretary of State.

Meeting agendas are available on the *Texas Register*'s Internet site:
http://www.sos.state.tx.us/open/index.shtml

Members of the public also may view these notices during regular office hours from a computer terminal in the lobby of the James Earl Rudder Building, 1019 Brazos (corner of 11th Street and Brazos) Austin, Texas. To request a copy by telephone, please call 512-463-5561. Or request a copy by email: register@sos.state.tx.us

For items ***not*** available here, contact the agency directly. Items not found here:

- minutes of meetings
- agendas for local government bodies and regional agencies that extend into fewer than four counties
- legislative meetings not subject to the open meetings law

The Office of the Attorney General offers information about the open meetings law, including Frequently Asked Questions, the *Open Meetings Act Handbook*, and Open Meetings Opinions.
http://www.oag.state.tx.us/open/index.shtml

The Attorney General's Open Government Hotline is 512-478-OPEN (478-6736) or toll-free at (877) OPEN TEX (673-6839).

Additional information about state government may be found here:
http://www.texas.gov

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Meeting Accessibility. Under the Americans with Disabilities Act, an individual with a disability must have equal opportunity for effective communication and participation in public meetings. Upon request, agencies must provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, large print or Braille documents. In determining type of auxiliary aid or service, agencies must give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify the contact person listed on the meeting notice several days before the meeting by mail, telephone, or RELAY Texas. TTY: 7-1-1.

THE ATTORNEY GENERAL

The *Texas Register* publishes summaries of the following: Requests for Opinions, Opinions, Open Records Decisions.

An index to the full text of these documents is available from the Attorney General's Internet site http://www.oag.state.tx.us. Telephone: 512-936-1730. For information about pending requests for opinions, telephone 512-463-2110.

An Attorney General Opinion is a written interpretation of existing law. The Attorney General writes opinions as part of his responsibility to act as legal counsel for the State of Texas. Opinions are written only at the request of certain state officials. The Texas Government Code indicates to whom the Attorney General may provide a legal opinion. He may not write legal opinions for private individuals or for any officials other than those specified by statute. (Listing of authorized requestors: http://www.oag.state.tx.us/opinopen/opinhome.shtml.)

Request for Opinion

RQ-0930-GA

Requestor:

Mr. Jeff May

Collin County Auditor

2300 Bloomdale Road, Suite 3100

McKinney, Texas 75701

Re: Authority of a commissioners court with regard to working hours, overtime and compensatory time and timekeeping by county employees (RQ-0930-GA)

Briefs requested by December 20, 2010

For further information, please access the website at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-201006619
Jay Dyer
Deputy Attorney General
Office of the Attorney General
Filed: November 19, 2010

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PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 1. ADMINISTRATION

PART 3. OFFICE OF THE ATTORNEY GENERAL

CHAPTER 63. PUBLIC INFORMATION SUBCHAPTER A. CONFIDENTIALITY OF INFORMATION REQUESTED FOR LEGISLATIVE PURPOSES

1 TAC §§63.1 - 63.6

The Office of the Attorney General (OAG) proposes a new Chapter 63, Subchapter A, §§63.1 - 63.6. The proposed rules would establish the process by which a legislator seeks an attorney general decision about whether information requested under Texas Government Code §552.008 for legislative purposes and for which the legislator is required to sign a confidentiality agreement is confidential under law. The purpose of the proposed rules is to implement Senate Bill (SB) 1182, enacted by the 81st Legislature, Regular Session (2009), which amends Chapter 552 of the Texas Government Code (the Public Information Act). Senate Bill 1182 requires the attorney general to adopt rules establishing the procedures and deadlines for a member, committee, or agency of the legislature to seek an attorney general decision about whether information requested under Texas Government Code §552.008 and covered by a confidentiality agreement is confidential under law.

Section 63.1 (Definition, Purpose, and Application) defines the term "legislative requestor," states the purpose of Subchapter A, and makes the Public Information Act's mailbox rule applicable to all deadlines in Subchapter A.

Section 63.2 (Request for Attorney General Decision Regarding Confidentiality) describes the steps a legislative requestor must take in order to request an attorney general decision about whether information requested under Texas Government Code §552.008 and covered by a confidentiality agreement is confidential under law.

Section 63.3 (Notice) establishes the deadline by and manner in which the attorney general must notify a governmental body of a legislative requestor's request for a decision.

Section 63.4 (Submission of Documents and Comments) sets deadlines for a governmental body to: (1) submit certain information to the attorney general upon receiving notice from the attorney general of a request for a decision; and (2) notify persons with property interests in the requested information. Section 63.4 also establishes procedures for the attorney general to receive written comments from a person with a property interest in the requested information and any other interested person.

Section 63.5 (Additional Information) allows the attorney general to obtain additional information from the governmental body if necessary and sets a deadline for the submission of such information.

Section 63.6 (Rendition of Attorney General Decision; Issuance of Written Decision) sets a deadline for the attorney general to issue a written decision and requires the decision be provided to the legislative requestor, the governmental body, and any interested person who submitted comments.

Amanda Crawford, Division Chief, Open Records Division, has determined that for each year of the first five years the proposed rules are in effect, the public benefit expected as a result of the rules is that legislators will receive attorney general decisions determining whether information requested for legislative purposes is confidential by law and therefore cannot be disclosed to constituents and other members of the public.

Ms. Crawford has also determined that for the first five-year period in which the proposed rules are in effect, there will be no foreseeable fiscal implications for any state or local government entities. Further, she has determined that for the first five-year period in which the proposed rules are in effect, there will be no economic cost to persons required to comply with the rules, and therefore there is no need to consider less costly alternatives to the rules. Finally, Ms. Crawford has determined that the adoption of §§63.1 - 63.6 will have no adverse effect on small business or micro-business or local employment.

Written comments on the proposed rules may be submitted for 30 days following the publication of this notice to Karen Hattaway, Deputy Division Chief, Open Records Division, Office of the Attorney General, P.O. Box 12548, Austin, Texas 78631-2548, (512) 936-6736, karen.hattaway@oag.state.tx.us.

Sections 63.1 - 63.6 are proposed in accordance with Texas Government Code §552.008(b-2), which requires the OAG to establish the procedures and deadlines for a member, committee, or agency of the legislature to seek an attorney general decision about whether information requested under Texas Government Code §552.008 and covered by a confidentiality agreement is confidential under law.

The proposed rules do not affect any other statutes.

§63.1. Definition, Purpose, and Application.

(a) In this subchapter, "legislative requestor" means an individual member, agency, or committee of the legislature.

(b) This subchapter governs the procedures by which the attorney general shall render a decision sought by a legislative requestor under Texas Government Code §552.008(b-2).

(c) Texas Government Code §552.308 applies to all deadlines established in this subchapter.

§63.2. Request for Attorney General Decision Regarding Confidentiality.

(a) If a governmental body that receives a written request for information from a legislative requestor under Texas Government Code §552.008 determines the requested information is confidential and requires the legislative requestor to sign a confidentiality agreement, the legislative requestor may ask for an attorney general decision about whether the information covered by the confidentiality agreement is confidential under law.

(b) A request for an attorney general decision must:

(1) be in writing and signed by the legislative requestor;

(2) state the name of the governmental body to whom the original request for information was made; and

(3) state the date the original request was made.

(c) The legislative requestor must submit a copy of the original request with the request for a decision. If the legislative requestor is unable to do so, the legislative requestor must include a written description of the original request in the request for a decision.

(d) The legislative requestor may submit written comments to the attorney general stating reasons why the requested information should not be considered confidential by law. The written comments must be labeled to indicate whether any portion of the comments discloses or contains the substance of the specific information deemed confidential by the governmental body. A legislative requestor who submits written comments to the attorney general shall send a copy of those comments to the governmental body.

(e) The deadlines in §63.3 and §63.6 of this subchapter commence on the date on which the attorney general receives from the legislative requestor all of the information required by subsections (b) and (c) of this section.

§63.3. Notice.

(a) The attorney general shall notify the governmental body in writing of a request for a decision and provide the governmental body a copy of the request for a decision within a reasonable time but not later than the 5th business day after the date of receiving the request for a decision.

(b) The attorney general shall provide the legislative requestor a copy of the written notice to the governmental body, excluding a copy of the request for a decision, within a reasonable time but not later than the 5th business day after the date of receiving the request for a decision.

§63.4. Submission of Documents and Comments.

(a) Within a reasonable time but not later than the 10th business day after the date of receiving the attorney general's written notice of the request for a decision, a governmental body shall:

(1) submit to the attorney general:

(A) written comments stating the law that deems the requested information confidential and the reasons why the stated law applies to the information;

(B) a copy of the written request for information; and

(C) a copy of the specific information deemed confidential by the governmental body, or representative samples of the information if a voluminous amount of information was requested; and

(2) label the copy of the specific information, or the representative samples, to indicate which laws applies to which parts of the copy; and

(3) label the written comments to indicate whether any portion of the comments discloses or contains the substance of the specific information deemed confidential by the governmental body.

(b) A governmental body that submits written comments to the attorney general shall send a copy of those comments to the legislative requestor within a reasonable time but not later than the 10th business day after the date of receiving the attorney general's written notice of the request for a decision.

(c) If a governmental body determines a person may have a property interest in the requested information, the governmental body shall notify that person in accordance with Texas Government Code §552.305(d). The governmental body shall notify the affected person not later than the 10th business day after receiving written notice of the request for a decision.

(d) If a person notified in accordance with Texas Government Code §552.305 decides to submit written comments to the attorney general, the person must do so not later than the 10th business day after receiving the notice. The written comments must be labeled to indicate whether any portion of the comments discloses or contains the substance of the specific information deemed confidential by the governmental body.

(e) Any interested person may submit written comments to the attorney general stating why the requested information is or is not confidential. The written comments must be labeled to indicate whether any portion of the comments discloses or contains the substance of the specific information deemed confidential by the governmental body.

(f) A person who submits written comments under subsection (d) or (e) of this section shall send a copy of those comments to both the legislative requestor and the governmental body.

§63.5. Additional Information.

(a) The attorney general may determine whether a governmental body's submission of information under §63.4(a) of this subchapter is sufficient to render a decision.

(b) If the attorney general determines that information in addition to that required by §63.4(a) of this subchapter is necessary to render a decision, the attorney general shall give written notice of that fact to the governmental body and the legislative requestor.

(c) A governmental body notified under subsection (b) of this section shall submit the necessary additional information to the attorney general not later than the seventh calendar day after the date the notice is received.

§63.6. Rendition of Attorney General Decision; Issuance of Written Decision.

(a) The attorney general shall promptly render a decision requested under this subchapter, not later than the 45th business day after the date of receiving the request for a decision.

(b) The attorney general shall issue a written decision and shall provide a copy of the decision to the legislative requestor, the governmental body, and any interested person who submitted necessary information or a brief to the attorney general about the matter.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 18, 2010.

TRD-201006605

Jay Dyer
Deputy Attorney General
Office of the Attorney General
Earliest possible date of adoption: January 2, 2011
For information regarding this publication, contact Zindia Thomas, Agency Liaison, at (512) 936-9901.

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TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 5. COMMUNITY AFFAIRS PROGRAMS

SUBCHAPTER A. GENERAL PROVISIONS

10 TAC §5.3, §5.20

The Texas Department of Housing and Community Affairs (the "Department") proposes amendments to 10 TAC Chapter 5, Subchapter A, §5.3 and §5.20, related to the Community Services Block Grant (CSBG) Program. The proposed amendments make changes to the existing rules to reflect income eligibility standards by program.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the proposed amendments are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the new sections.

Mr. Gerber has also determined that for each year of the first five years the amended sections are in effect the public benefit anticipated will be to permit the adoption of new rules, thereby enhancing the state's ability to provide decent, safe and sanitary housing administered by the Department. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the new sections as proposed. The proposed amendments will not impact local employment.

Public comment period will be December 3, 2010 through January 3, 2011 to receive input on the proposed amendments. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2011 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-4624. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. JANUARY 3, 2011.

The amended sections are proposed pursuant to the authority of the Texas Government Code Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by the proposed amendments.

§5.3. Definitions.

(a) To ensure a clear understanding of the terminology used in the context of the Community Affairs Programs, a list of terms and definitions has been compiled as a reference.

(b) The following words and terms in this chapter shall have the following meaning unless the context clearly indicates otherwise.

(1) CAA--Community Action Agency.

(2) CFR--Code of Federal Regulations.

(3) Children--Household dependents not exceeding eighteen (18) years of age.

(4) Collaborative Application--An application from two or more organizations which will use Emergency Shelter Grants Program (ESGP) funds to provide services to the target population as part of a local continuum of care. If a unit of general local government applies for only one organization, this will not be considered a collaborative application. Partners in the collaborative application must coordinate services and prevent duplication of services.

(5) Community Action Plan--A plan required by the Community Services Block Grant (CSBG) Act which describes the local (subrecipient) service delivery system, how coordination will be developed to fill identified gaps in services, how funds will be coordinated with other public and private resources and how the local entity will use the funds to support innovative community and neighborhood based initiatives related to the grant.

(6) Cooling--Modifications including, but not limited to, the repair or replacement of air conditioning units, evaporative coolers, and refrigerators.

(7) Community Action Agencies (CAAs)--Local private and public non-profit organizations that carry out the Community Action Program (CAP), which was founded by the 1964 Economic Opportunity Act to fight poverty by empowering the poor in the United States. Each CAA must have a board consisting of at least one-third elected public officials, not fewer than one-third representatives of low-income individuals and families, chosen in accordance with democratic selection procedures, and the remainder are members of business, industry, labor, religious, law enforcement, education, or other major groups and interests in the community.

(8) Community Affairs Division (CAD)--The Division at the Texas Department of Housing and Community Affairs which administers the CSBG, ESGP, Comprehensive Energy Assistance Program (CEAP), Weatherization Assistance Program (WAP), and Section 8 Housing Choice Voucher Programs.

(9) The Community Services Block Grant (CSBG)--A grant which provides U.S. federal funding for Community Action Agencies (CAAs) and other eligible entities that seek to address poverty at the community level. Like other block grants, CSBG funds are allocated to the states and other jurisdictions through a formula.

(10) Community Services Block Grant (CSBG) Act--The CSBG Act is a law passed by Congress authorizing the Community Services Block Grant. The CSBG Act was amended by the Community Services Block Grant Amendments of 1994 and the Coats Human Services Reauthorization Act of 1998 under 42 U.S.C. §§9901, et seq. The act authorized establishing a community services block grant program to make grants available through the program to states to ameliorate the causes of poverty in communities within the states.

(11) CSBG Subrecipient--Includes CSBG eligible entities and other organizations that are awarded CSBG funds.

(12) Department--The Texas Department of Housing and Community Affairs.

(13) Discretionary Funds--Those CSBG funds maintained in reserve by a State, at its discretion, for CSBG allowable uses as authorized by §675C of the CSBG Act, and not designated for distribution on a statewide basis to CSBG eligible entities and not held in reserve for state administrative purposes.

(14) DOE--The United States Department of Energy.

(15) DOE WAP Rules--10 CFR Part 440 of the Code of Federal Regulations describing the Weatherization Assistance for Low Income Persons as administered through the Department of Energy.

(16) Dwelling Unit--A house, including a stationary mobile home, an apartment, a group of rooms, or a single room occupied as separate living quarters.

(17) Equipment--A tangible non-expendable personal property including exempt property, charged directly to the award, having a useful life of more than one year, and an acquisition cost of $5,000 or more per unit. For CSBG, CEAP, and WAP, if the unit acquisition cost exceeds $5,000, approval from the TDHCA Community Affairs Division must be obtained before the purchase takes place. For ESGP, if the unit acquisition cost exceeds $500, approval from TDHCA Community Affairs Division must be obtained before the purchase is made.

(18) Elderly Person--A person who is sixty (60) years of age or older.

(19) Electric Base-Load Measure--Weatherization measures which address the energy efficiency and energy usage of lighting and appliances.

(20) Eligible Entity--Those local organizations in existence and designated by the federal government to administer programs created under the federal Economic Opportunity Act of 1964. This includes community action agencies, limited-purpose agencies, and units of local government. The CSBG Act defines an eligible entity as an organization that was an eligible entity on the day before the enactment of the Coats Human Services Reauthorization Act of 1998, (October 27, 1998), or is designated by the Governor to serve a given area of the State and that has a tripartite board or other mechanism for local governance.

(21) Emergency--Defined by the LIHEAP Act of 1981 (Title XXVI of the Omnibus Budget Reconciliation Act of 1981, 42 U.S.C. §8622):

(A) natural disaster;

(B) a significant home energy supply shortage or disruption;

(C) significant increase in the cost of home energy, as determined by the Secretary;

(D) a significant increase in home energy disconnections reported by a utility, a State regulatory agency, or another agency with necessary data;

(E) a significant increase in participation in a public benefit program such as the food stamp program carried out under the Food Stamp Act of 1977 (7 U.S.C. §§2011, et seq.), the national program to provide supplemental security income carried out under title XVI of the Social Security Act (42 U.S.C. §§1381, et seq.) or the State temporary assistance for needy families program carried out under Part A of Title IV of the Social Security Act (42 U.S.C. §§601, et seq.), as determined by the head of the appropriate federal agency;

(F) a significant increase in unemployment, layoffs, or the number of households with an individual applying for unemployment benefits, as determined by the Secretary of Labor; or

(G) an event meeting such criteria as the Secretary, at the discretion of the Secretary, may determine to be appropriate.

(22) Energy Repairs--Weatherization related repairs necessary to protect or complete regular weatherization energy efficiency measures.

(23) Energy Audit--The energy audit software and procedures used to determine the cost effectiveness of weatherization measures to be installed in a dwelling unit.

(24) Families with Young Children--A family that includes a child age five (5) or younger.

(25) USDHHS--U.S. Department of Health and Human Services.

(26) High Energy Burden--Determined by dividing a household's annual home energy costs by the household's annual gross income. The percentage at which energy burden is considered high is defined by data gathered from the State Data Center.

(27) High Energy Consumption--Household energy expenditures exceeding the median of low-income home energy expenditures expressed in the data collected from the State Data Center.

(28) Homeless or homeless individual--An individual who:

(A) lacks a fixed, regular, and adequate nighttime residence; or

(B) has a primary nighttime residence that is:

(i) a supervised publicly or privately operated shelter designed to provide temporary living accommodations (including welfare hotels, congregate shelters, and transitional housing for the mentally ill);

(ii) an institution that provides a temporary residence for individuals intended to be institutionalized; or

(iii) a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings. (Exclusion: The term "homeless" or "homeless individual" does not include any individual imprisoned or otherwise detained pursuant to an Act of Congress or a State law.)

(29) Household--Any individual or group of individuals who are living together in a dwelling unit as one economic unit. For energy programs, these persons customarily purchase residential energy in common or make undesignated payments for energy.

(30) Inverse Ratio of Population Density Factor--The number of square miles of a county divided by the number of poverty households of that county.

(31) Local Units of Government--City, county, or council of governments.

(32) Low Income--Income in relation to family size [~~which~~]:

(A) For CEAP and WAP, [~~and CSBG is~~] at or below 200% of the Federal Income guidelines;

(B) For CSBG, at or below 125% of the Federal Income guidelines;

(C) [~~(B)~~] For ESGP, at or below 100% of the poverty level, determined in accordance with criteria established by the Director of the Office of Management and Budget;

(D) For HPRP, 50% of the Area Median Income (AMI) as defined by HUD;

(E) [~~(C)~~] Is the basis on which cash assistance payments have been paid during the preceding twelve (12) month-period under titles IV and XVI of the Social Security Act or applicable state or local law; or

(F) [~~(D)~~] If a state [~~State~~] elects, is the basis for eligibility for assistance under the Low Income Home Energy Assistance Act of 1981, provided that such basis is at least 125% of the poverty level determined in accordance with criteria established by the Director of the Office of Management and Budget.

(33) Low Income Home Energy Assistance Program (LIHEAP)--A federally funded block grant program that is implemented to serve low income households who seek assistance for their home energy bills and/or weatherization services.

(34) Migrant Farm worker--An individual or family that is employed in agricultural labor or related industry and is required to be absent overnight from their permanent place of residence.

(35) Multifamily Dwelling Unit--A structure containing more than one dwelling unit.

(36) National Performance Indicator--An individual measure of performance within the Department's reporting system for measuring performance and results of subrecipients of funds. There are currently twelve indicators of performance which measure self-sufficiency, family stability, and community revitalization.

(37) Needs Assessment--An assessment of community needs in the areas to be served with CSBG funds. The assessment is a required part of the Community Action Plan per Assurance 11 of the CSBG Act.

(38) OMB--Office of Management and Budget, a federal agency.

(39) Outreach--The method that attempts to identify clients who are in need of services, alerts these clients to service provisions and benefits, and helps them use the services that are available. Outreach is utilized to locate, contact and engage potential clients.

(40) Performance Statement--A document which identifies the services to be provided by a CSBG subrecipient. The document is an attachment to the CSBG contract entered into by the Department and the CSBG subrecipient.

(41) Persons with Disabilities--Any individual who is:

(A) a handicapped individual as defined in §7(9) of the Rehabilitation Act of 1973;

(B) under a disability as defined in §1614(a)(3)(A) or §223(d)(1) of the Social Security Act or in §102(7) of the Developmental Disabilities Services and Facilities Construction Act; or

(C) receiving benefits under 38 U.S.C., Chapter 11 or 15.

(42) Population Density--The number of persons residing within a given geographic area of the state.

(43) Poverty Income Guidelines--The official poverty income guidelines as issued by the U.S. Department of Health and Human Services annually.

(44) Private Nonprofit Organization--An organization which has status as a §501(c)(3) tax-exempt entity. Private nonprofit organizations applying for ESGP funds must be established for charitable purposes and have activities that include, but are not limited to, the promotion of social welfare and the prevention or elimination of homelessness. The entity's net earnings may not inure to the benefit of any individual(s).

(45) Public Organization--A unit of local government, as established by the Legislature of the State of Texas. Includes, but may not be limited to, cities, counties, and councils of governments.

(46) Referral--The process of providing information to a client household about an agency, program, or professional person that can provide the service(s) needed by the client.

(47) Rental Unit--A dwelling unit occupied by a person who pays rent for the use of the dwelling unit.

(48) Renter--A person who pays rent for the use of the dwelling unit.

(49) Seasonal Farm Worker--An individual or family that is employed in seasonal or temporary agricultural labor or related industry and is not required to be absent overnight from their permanent place of residence. In addition, at least 20% of the household annualized income must be derived from the agricultural labor or related industry.

(50) Secretary--Chief Executive of the U.S. Department of Health and Human Services.

(51) Service--The provision of work or labor that does not produce a tangible commodity.

(52) Shelter--Defined by the Department as a dwelling unit or units whose principal purpose is to house on a temporary basis individuals who may or may not be related to one another and who are not living in nursing homes, prisons, or similar institutional care facilities.

(53) Single Family Dwelling Unit--A structure containing no more than one dwelling unit.

(54) Social Security Act--42 U.S.C. §§601, et seq., CSBG works with activities carried out under Title IV Part A to assist families to transition off of state programs.

(55) State--The State of Texas or the Texas Department of Housing and Community Affairs.

(56) Subcontractor--An organization with whom the subrecipient contracts with to administer programs.

(57) Subrecipient--According to each program subchapter, subrecipient may be defined as organizations with whom the Department contracts with and provides CSBG funds; ESGP funds; DOE funds or, LIHEAP funds.

(58) Supplies--All personal property excluding equipment, intangible property, and debt instruments, and inventions of a contractor conceived or first actually reduced to practice in the performance of work under a funding agreement ("subject inventions"), as defined in 37 CFR Part 401, "Rights to Inventions Made by Non-profit Organizations and Small Business Firms Under Government Grants, Contracts, and Cooperative Agreements."

(59) TAC--Texas Administrative Code.

(60) Targeting--Focusing assistance to households with the highest program applicable needs.

(61) Terms and Conditions--Binding provisions provided by a funding organization to grantees accepting a grant award for a specified amount of time.

(62) Treatment as a State or Local Agency--For purposes of 5 U.S.C. Chapter 15, any entity that assumes responsibility for planning, developing, and coordinating activities under the CSBG Act and receives assistance under CSBG Act shall be deemed to be a state [~~State~~] or local agency.

(63) Units of General Local Government--A unit of local government which has, among other responsibilities, the authority to assess and collect local taxes and to provide general governmental services.

(64) U.S.C.--United States Code.

(65) Vendor Agreement--An agreement between the subrecipient and energy vendors that contains assurance as to fair billing practices, delivery procedures, and pricing for business transactions involving LIHEAP beneficiaries.

(66) WAP--Weatherization Assistance Program.

(67) WAP PAC--Weatherization Assistance Program Policy Advisory Council. The WAP PAC was established by the Department in accordance with 10 CFR §440.17 to provide advisory services in regards to the WAP program.

(68) Weatherization Material--The material listed in Appendix A of 10 CFR Part 440.

(69) Weatherization Project--A project conducted in a single geographical area which undertakes to reduce heating and cooling demand of dwelling units that are energy inefficient.

§5.20. Determining Income Eligibility.

(a) The U.S. Department of Health and Human Services (USDHHS) annually provides poverty income guidelines for use in determining client eligibility. Community Affairs Division programs are required to follow these income guidelines for the programs listed in subsections (b) - (d) of this section.

(b) The following client eligibility levels (until superseded) shall apply to clients at the time the client makes an application for services:

(1) Community Services Block Grant (CSBG)--125% of the current federal poverty level;

(2) Emergency Shelter Grants Program (ESGP)--100% of the current federal poverty level;

(3) Homelessness Prevention and Rapid Re-Housing Program (HPRP)--50% of Area Median Income as defined by USDHUD;

(4) Weatherization Assistance Program (WAP) and ARRA WAP--200% of the current federal poverty level; and

(5) Comprehensive Energy Assistance Program (CEAP)--200% of the current federal poverty level.

[(b) The subrecipients shall establish the client eligibility level at or below 200% of the federal poverty level in effect at the time the client makes an application for services.]

(c) To determine income eligibility for program services, subrecipients must base annualized eligibility determinations on household income from thirty (30) days prior to the date of application for assistance. Each subrecipient must maintain documentation of income from all sources for all household members for the entire thirty (30) day period prior to the date of application and multiply the monthly amount by twelve (12) to annualize income. Income documentation must be collected from all income sources for all household members eighteen (18) years and older for the entire thirty (30) day period.

(d) If proof of income is unavailable, the applicant must complete and sign a Department approved Declaration of Income Statement.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 18, 2010.

TRD-201006603
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: January 2, 2011
For further information, please call: (512) 475-3916

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SUBCHAPTER B. COMMUNITY SERVICES BLOCK GRANT (CSBG)

10 TAC §§5.203, 5.207, 5.210, 5.216

The Texas Department of Housing and Community Affairs (the "Department") proposes amendments to 10 TAC Chapter 5, Subchapter B, §§5.203, 5.207, 5.210 and 5.216 related to the Community Services Block Grant (CSBG) Program. The proposed amendments make changes to the existing rules to remove the actual formula for allocation of funds and new requirement changes to submit the CSBG Performance Statement with the CAP plan and certifying a public hearing was held. In addition, changes to address the requirements of informing custodial parents of services to collect child support payments; steps for a CSBG grievance procedure, and guidance on board responsibility.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the proposed amended sections are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the new sections.

Mr. Gerber has also determined that for each year of the first five years the amended sections are in effect the public benefit anticipated will be to permit the adoption of new rules, thereby enhancing the state's ability to provide decent, safe and sanitary housing administered by the Department. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the new sections as proposed. The proposed amendments will not impact local employment.

Public comment period will be December 3, 2010 through January 3, 2011 to receive input on the proposed amendments. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2011 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-4624. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. JANUARY 3, 2011.

The amended sections are proposed pursuant to the authority of the Texas Government Code Chapter 2306, which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by the proposed amended sections.

§5.203. Distribution of CSBG Funds.

(a) The CSBG Act requires that no less than 90% of the state's allocation be allocated to eligible entities. The Department currently utilizes a multi-factor fund distribution formula to equitably provide CSBG funds throughout the state's 254 counties to the CSBG eligible entities. Revisions to the formula shall be considered on a biennial basis including the release of decennial census figures. Changes to the formula shall be presented to the Governing Board for approval. [The formula incorporates the most current decennial U.S. Census figures

~~at 125% of poverty; a $50,000 base; a $150,000 floor (the minimum funding level); a 98% weighted factor for poverty population; and, a 2% weighted factor for the inverse ratio of population density.~~]

~~[(1) Each eligible entity receives a base amount of $50,000;]~~

~~[(2) The weighted factors of poverty population and population density are applied to the funds remaining after the base award funds have been distributed to each eligible entity;]~~

~~[(3) The Department then determines if any eligible entity is below the $150,000 floor after the base amount and weighted factors (poverty population and population density) have been applied, then the minimum floor amount is reserved for those entities below $150,000;]~~

~~[(4) The remaining funds are distributed to the remaining eligible entities. As was done with the initial run of the formula, each of the remaining eligible entities receives the base amount of $50,000 and then the weighted factors (poverty population and population density) are applied to determine the allocation amounts for eligible entities funded above the $150,000.]~~

(b) Five percent [~~(5%)~~] of the Department's annual allocation of CSBG funds and any funds not spent as identified in subsection (c) of this section, may be expended for activities as per 42 U.S.C. §9907(b)(A) - (H) and activities that may include:

(1) the provision of training and technical assistance to CSBG eligible entities;

(2) services to low-income migrant seasonal farm worker and Native American populations;

(3) assisting CSBG eligible entities in responding to natural or man-made disasters;

(4) funding for innovative and demonstration projects that assist CSBG target population groups to overcome at least one of the barriers to attaining self-sufficiency; and

(5) other projects/initiatives, including state conference expenses. The Department may provide monetary awards to subrecipients for outstanding performance. To ensure consistent and comparable results, the process for monetary awards to CSBG subrecipients will be standardized.

(c) Up to 5% [~~five percent (5%)~~] of the Department's annual allocation of CSBG funds will be used for administrative purposes consistent with state and federal law.

§5.207. Subrecipient Performance.

(a) Budgets. CSBG eligible entities and any other funded organizations shall submit a budget to facilitate the contract execution process. A certification of board approval of CSBG budget form issued by the Department must also be submitted with planned budgets.

(b) Unexpended Funds. The Department reserves the right to deobligate funds.

(1) The U.S. Department of Health and Human Services Administration for Children and Families issues terms and conditions for receipt of funds under the CSBG. Subrecipients of CSBG funds will comply with the requirements of the terms and conditions of the CSBG award. Services must be provided on or before September 30th of the subsequent year and funds must be fully expended.

(2) The Coats Human Services Reauthorization Act of 1998, allows states to recapture unexpended CSBG funds in excess of 20% of the CSBG funds obligated to an eligible entity. This may be superseded by Congressional action in the appropriation process or by the terms and conditions issued by U.S. Department of Health and Human Services in the CSBG award letter.

(c) Services to Poverty Population. The subrecipient organizations administering services to clients in one or more CSBG service area counties shall ensure that such services are rendered reasonably and in an equitable manner to ensure fairness among all potential applicants eligible for services. Services rendered must reflect the poverty population ratios in the service area and services should be distributed based on the proportionate representation of the poverty population within a county. A variance of greater than plus or minus 20% may [~~will~~] constitute a finding. Subrecipients with a service area of a single county shall demonstrate marketing and outreach efforts to render direct services to a reasonable percentage of the county's eligible population based on the most recent decennial census. Services should also be distributed based on the proportionate representation of the poverty population within a county.

§5.210. CSBG Needs Assessment and Community Action Plan.

(a) In accordance with the CSBG Act and §676 of the Act, the Department is required to secure a Community Action Plan on an annual basis from each CSBG eligible entity due on October 31st.

(b) Every five (5) years, the CSBG Community Action Plan will include a community needs assessment from every CSBG Eligible Entity.

(c) The Community Action Plan shall at a minimum include a description of the delivery of services for the case management system [~~and~~] in accordance with the National Performance Indicators and shall include a performance statement that describes the services, programs and activities to be administered by the organization.

(d) Hearing. A board certification that a public hearing was conducted on the proposed use of funds for the Community Action Plan must be submitted to the Department with the plan.

(e) [~~(d)~~] Intake Form. To fulfill the requirements of 42 U.S.C. §9917, CSBG subrecipients must complete an intake form which includes the demographic and household characteristic data required for the monthly performance and expenditure report, referenced in Subchapter A of this chapter, for all households receiving a community action service. A new CSBG intake form or a centralized intake form must be completed on an annual basis to coincide with the CSBG program year of January 1st through December 31st.

(f) [~~(e)~~] Case Management.

(1) In keeping with the regulations issued under Title II, §676(b) State Application and Plan, the Department requires CSBG subrecipients to incorporate integrated case management systems in the administration of their CSBG program (Title II, §676(b)). Incorporating case management in the service delivery system and providing assistance that has a long-term impact on the client, such as enabling the client to move from poverty to self-sufficiency, to maintain stable families, and to revitalize the community, supports the requirements of Title II, §676(b). An integrated case management system, improves the overall provision of assistance and improves each subrecipient's ability to transition persons from poverty to self-sufficiency.

(2) Subrecipients must have in operation a case management program that has the following components:

(A) Intake Form;

(B) Pre-assessment to determine service needs, to determine the need for case management, and to determine which individuals/families to consider enrolling in case management program;

(C) Integrated assessment of individual/family service needs of those accepted into case management program;

(D) Development of case management service plan to meet goals and become self-sufficient;

(E) Provision of services and coordination of services to meet needs and achieve self-sufficiency;

(F) Monitoring and follow-up of participant's progress;

(G) Case closure, once individual has become self-sufficient; and

(H) Evaluation process to determine effectiveness of case management system.

(3) As required by 42 U.S.C. §678G(b)(1-2), CSBG subrecipients shall inform custodial parents in single-parent families that participate in programs, activities, or services about the services available through the Texas Attorney General's Office with respect to the collection of child support payments and/or refer eligible parents to the Texas Attorney General's Office of Child Support Services Division.

(g) [~~(f)~~] Non-CSBG eligible entities [~~Organizations~~] receiving state discretionary funds under §5.203(b) of this subchapter (relating to Distribution of CSBG Funds) are not required to submit a Community Action Plan. All CSBG subrecipients must develop a performance statement which identifies the services, programs, and activities to be administered by the organization.

(h) Subrecipient Requirements for Appeals Process for CSBG Applicants/Clients. Subrecipients shall establish a CSBG grievance procedure to address written complaints from program applicants/clients. At a minimum, the following procedures shall be included:

(1) Subrecipients shall provide a written denial of assistance notice to applicant/client within ten (10) days of the adverse determination. This notification shall include written instructions of the appeals process and specific reasons for the denial by component. The applicant wishing to appeal a decision must provide written notice to subrecipient within ten (10) days of receipt of the denial notice;

(2) The subrecipient who receives an appeal or client complaint shall establish a hearing committee composed of at least three persons. Subrecipient shall maintain documentation of appeals/complaints in their client files;

(3) The subrecipient shall hold the hearing within ten (10) business days after the subrecipient received the appeal/complaint request from the applicant/client;

(4) The subrecipient shall record the hearing;

(5) The hearing shall allow time for a statement by subrecipient staff with knowledge of the case;

(6) The hearing shall allow the applicant/client at least equal time, if requested, to present relevant information contesting the decision;

(7) Subrecipient shall notify applicant/client of the decision in writing. The subrecipient shall mail the notification by close of business on the business day following the decision (1-day turnaround);

(8) If the applicant/client is not satisfied, they may further appeal the decision in writing to the Department within ten (10) days of notification of an adverse decision;

(9) The Department may review the recording of the hearing, the committee's decision, and any other relevant information necessary;

(10) Pursuant to §1.7 of this title (relating to Staff Appeals Process), Department staff shall review the case and forward the recommendation to the Division Director for final concurrence; and

(11) The Department will notify all parties in writing of its decision within thirty (30) days of receipt of the appeal.

§5.216. Board Responsibility.

(a) Tripartite boards have a fiduciary responsibility for the overall operation of the private nonprofit entity. Members are expected to carry out their duties as any reasonably prudent person would do.

(b) At a minimum, board members are expected to:

(1) Maintain regular attendance of board and committee meetings;

(2) Develop thorough familiarity with core agency information, such as the agency's bylaws, as appropriate, articles of incorporation, sources of funding, agency goals and programs, federal and state CSBG statutes;

(3) Exercise careful review of materials provided to the board;

(4) Make decisions based on sufficient information;

(5) Ensure that proper fiscal systems and controls, as well as a legal compliance system, are in place; [~~and~~]

(6) Maintain knowledge of all major actions taken by the agency; and[~~.~~]

(7) Receive regular reports that includes:

(A) Review and approval of all funding requests (including budgets);

(B) Review of reports on the organization's financial situation;

(C) Regular reports on the progress of goals specified in the performance statement or program proposal;

(D) Regular reports addressing the rate of expenditures as compared to those projected in the budget;

(E) Updated modifications to policies and procedures concerning employee's and fiscal operations; and

(F) Updated information on community conditions that affect the programs and services of the organization.

(c) Individuals that agree to participate on a tripartite governing board, accept the responsibility to assure that the agency they represent continues to:

(1) assess and respond to the causes and conditions of poverty in their community;[~~,~~]

(2) achieve anticipated family and community outcomes;[~~,~~] and

(3) remains administratively and fiscally sound. Excessive absenteeism of board members compromises the mission and intent of the program.

(d) Residence Requirement:

(1) All board members shall reside within the subrecipient's CSBG service area designated by the CSBG contract. Board members should be selected so as to provide representation for all geo-

graphic areas within the designated service area; however, greater representation may be given on the board to areas with greater poverty population. Low-income representatives must reside in the area that they represent; and

(2) Subrecipients may request a waiver of the residency requirement to the Director of the Community Affairs Division for review for consideration and/or approval.

(e) Improperly Constituted Board. If the Department determines that a board of an eligible entity is improperly constituted, the Department shall prescribe the necessary remedial action, a timeline for implementation and possible sanctions which may include:

(1) cost reimbursement method of payment;

(2) withholding of funds;

(3) contract suspension; and

(4) termination of funding.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 18, 2010.

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Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: January 2, 2011
For further information, please call: (512) 475-3916

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SUBCHAPTER C. EMERGENCY SHELTER GRANTS PROGRAM (ESGP)

10 TAC §§5.303, 5.304, 5.310

The Texas Department of Housing and Community Affairs (the Department) proposes amendments to 10 TAC Chapter 5, Subchapter C, §§5.303, 5.304 and 5.310 related to the Emergency Shelter Grants Program (ESGP). The proposed amendments make changes to the existing rules to address the redistribution and/or reallocation of unexpended ESGP funds; ensure ESGP funds are expended for eligible clients; outline the steps of a grievance process and clarify guidance on essential services.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the proposed amended sections are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the new sections.

Mr. Gerber has also determined that for each year of the first five years the amended sections are in effect the public benefit anticipated will be to permit the adoption of new rules, thereby enhancing the state's ability to provide decent, safe and sanitary housing administered by the Department. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the new sections as proposed. The proposed amendments will not impact local employment.

Public comment period will be accepted December 3, 2010 through January 3, 2011 to receive input on the proposed amendments. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2011 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by email to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-4624. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. JANUARY 3, 2011.

The amended sections are proposed pursuant to the authority of the Texas Government Code Chapter 2306, which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by the proposed amended sections.

§5.303. Distribution of ESGP Funds.

(a) All Texas counties fall within one of the thirteen (13) [~~13~~] uniform state service regions. Funds are reserved for each region in direct proportion to the region's percentage of poverty population according to the decennial U.S. census.

(b) Applications are grouped by service region. Eligible applications compete only against other eligible applications from the same service region, with the highest ranking application being funded first.

(c) The Department will determine the number of applications which can be funded within each region based on the amount of funds available for distribution in each region. ESGP funds reserved for a particular region will be obligated to eligible applicant organizations within that region. If the region does not have enough responsive applications which meet the funding threshold, funds will be redistributed.

(d) Upon approval by the Department's Board of Directors, applicants receiving ESGP funds shall enter into and execute an agreement for the receipt of ESGP funds.

(1) Amendments. The Department, acting by and through its Executive Director or his/her designee, may authorize, execute, and deliver modifications and/or amendments to the ESGP contract.

(2) The Department reserves the right to deobligate funds.

(3) Faith-based subrecipients, as with all subrecipients funded under the U.S. Department of Housing and Urban Development (HUD)-funded programs, must serve all eligible beneficiaries without regard to religion.

(e) Allocation of Funds. The Department shall administer all federal ESGP funds provided to the state under the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. §§11371 - 11378), now known as the McKinney-Vento Homeless Assistance Act in accordance with the HUD's final ESG rule, 24 CFR Part 576 and Chapter 2306, Texas Government Code, and the Department annual consolidated plan.

(f) The Department must obligate at least 95% of these funds for ESGP funded applicants.

(g) The Department may retain 5% for administration and may share a portion of its administrative funds with units of general local government (city or county) selected for funding.

(h) The Department will obligate funds within sixty-five (65) days of receiving the award letter from HUD [~~the U.S. Department of Housing and Urban Development~~].

(i) Redistribution/Reallocation of Unexpended Funds.

(1) The Department obligates all ESGP available program funds. The Department may have funds available from a previous grant period or during a current grant period, in cases where:

(A) Subrecipients may have unexpended contract balances at the end of their contract;

(B) Funds may remain unobligated if an applicant fails to provide the necessary documentation to execute a contract;

(C) An applicant fails to meet the requirements of the contract; or

(D) A Subrecipient relinquishes all or part of the award.

(2) The Department will determine the most equitable and beneficial use of unspent program funds. In determining the reallocation or redistribution of funds, the Department will consider current Subrecipient's program performance and expenditure rates and regional need.

(3) In cases where program funds may remain unobligated or unspent from a previous program year, the Department will allocate funds to those current Subrecipients who received funds during the previous program year for which funds remained unexpended. Every attempt will be made to reallocate the funds within the region for which it originally was reserved, however, the Department may allocate funds to another region.

(4) If program funds become available during the contract period, the Department will make every effort to reallocate those funds within the respective region, however, the Department, at its discretion, may reallocate those funds to another region.

§5.304. Use of Funds.

(a) Eligible Activities. ESGP funds are designed to address the immediate needs of homeless persons, as defined in 42 U.S.C. §11302, to assist their movement to permanent housing:

(1) ESGP funds may be utilized to assist individuals and families who would actually become or remain homeless without ESGP homelessness prevention assistance;

(A) Termination of assistance. Subrecipients may terminate assistance provided by ESGP funded activities to participants who violate program requirements. The termination, however, must allow for the due process of the terminated participant's rights.

(B) If an individual or family who receives assistance under this part from a Subrecipient violates program requirements, the recipient may terminate assistance in accordance with a formal process established by the recipient that recognizes the rights of individuals affected, which may include a hearing.

(i) Subrecipient Termination of Participant Services. Grantees and recipients in the ESG program may terminate assistance provided by ESGP-funded activities to participants who violate program requirements. The termination, however, must protect the due process of the terminated participant.

(ii) Recipients must have in place a procedure that governs the termination and grievance process. These procedures should describe the program requirements and the termination process, as well as the grievance procedure that allows participants to request a hearing regarding the termination of their assistance.

(iii) It is important that recipient organizations effectively communicate the termination and grievance procedures to participants and ensure that the procedures are fully understood. For example, the recipient organization staff might verbally explain the procedures to participants upon entry, intake, or orientation to the ESG-funded program and make the procedures readily available to participants either with written information or by posting the policy in a public place. Posting the policy on a bulletin board in a common area within the facility is an effective way to ensure that the procedures are available for participants to access at any time.

(iv) The federal regulation at 24 CFR §576.56(a)(3) describes the termination provision: "Grantees and recipients may, in accordance with 42 U.S.C. §11375(e), terminate assistance provided under this part to an individual or family who violates program requirements."

(v) The federal statute 42 U.S.C. §11375(e) details termination of assistance: If an individual or family who receives assistance under this part from a recipient violates program requirements, the recipient may terminate assistance in accordance with a formal process established by the recipient that recognizes the rights of individuals affected, which may include a hearing.

(C) The applicant/client grievance procedure may include some of the following elements.

(i) Subrecipients shall provide a written denial of assistance notice to applicant/client within ten (10) days of the adverse determination. This notification shall include written instructions of the appeals process and specific reasons for the denial by component. The applicant wishing to appeal a decision must provide written notice to subrecipient within ten (10) days of receipt of the denial notice.

(ii) The subrecipient who receives an appeal or client complaint shall establish a hearing committee composed of at least three persons. Subrecipient shall maintain documentation of appeals/complaints in their client files.

(iii) The subrecipient shall hold the hearing within ten business days after the subrecipient received the appeal/complaint request from the applicant/client.

(iv) The subrecipient shall record the hearing.

(v) The hearing shall allow time for a statement by subrecipient staff with knowledge of the case.

(vi) The hearing shall allow the applicant/client at least equal time, if requested, to present relevant information contesting the decision.

(vii) Subrecipient shall notify applicant/client of the decision in writing. The subrecipient shall mail the notification by close of business on the business day following the decision (1 day turnaround).

(viii) If the applicant/client is not satisfied, they may further appeal the decision in writing to the Department within ten (10) days of notification of an adverse decision.

(ix) The Department may review the recording of the hearing, the committee's decision, and any other relevant information necessary.

(x) The Department appeals committee shall decide the case and forward their recommendation to the Division Director for final concurrence.

(xi) The Department will notify all parties in writing of its decision within thirty (30) days of receipt of the appeal.

(2) ESGP funds cannot be utilized to care for or assist children in state custody; and

(3) The Department encourages that applications include an innovative approach to providing emergency shelter and/or transitional housing to homeless individuals and families. Transitional housing projects should be designed to provide housing and appropriate essential services to homeless persons in order to facilitate the move-

ment of individuals or families to permanent housing within no more thantwenty-four (24) [24] months. ESGP grant amounts may be used for one or more of the following activities in subsections (b) - (f) of this section.

(b) Operation administration may not exceed more than 10% of an applicant's ESGP budget (42 U.S.C. §11374(a)(3)) and may be requested for administrative salaries (including fringe benefits).

(1) Appropriate staff which may be charged as administrative staff are the executive director, program director, supervisors, administrative support staff, etc.

(2) Job descriptions for these positions are not required to be included in the ESGP application.

(c) Essential Services. ESGP legislation limits essential services to 30% of the total state allocation (24 CFR §576.3 and 42 U.S.C. §11374(a)(2)(b)).

(1) Essential services activities address the immediate needs of homeless individuals and enable homeless persons to become more independent and/or to secure permanent housing. Assistance provided under ESGP may be used for the provision of essential [Essential] services including [may include direct client] services concerned with employment, health, drug abuse prevention, and education, including but not limited to:

(A) assistance in obtaining permanent housing; medical health treatment; mental health treatment, counseling supervision, and other services essential for achieving independent living; [and psychological counseling and supervision; employment counseling, job placement, and job training (including tuition and books);]

(B) nutrition assistance, including [nutritional counseling and] the salary of food preparers (cooks);

[(C) substance abuse treatment and counseling;]

(C) [(D)] assistance in obtaining other federal, state, and local assistance including mental health benefits, medical assistance, veteran's benefits, and income support assistance such as Supplemental Security Income, Temporary Assistance for Needy Families, and Food Stamps;

(D) [(E)] other services such as childcare, food vouchers, client clothing, or medical assistance (doctor visits, prescriptions, eye glasses or other prostheses, etc.);

(E) [(F)] transportation costs essential for achieving independent living including costs directly associated with ESGP service delivery, such as bus tokens, bus fare, cab fare, airfare, salary of van driver, etc.; and

(F) [(G)] salary for staff whose sole duty is to work directly with clients to provide the above services.

(2) Staff salaries may include wages and fringe benefits; however, no administrative or supervisory salaries may be paid with essential services funds.

(3) ESGP funds may be used to provide essential services, if the agency received local funds (locally generated tax revenue) from a unit of local government in the past twelve (12) [12] months, only if the ESGP application includes a request for funds to provide essential services for a new service (24 CFR §576.21(b)).

(d) Maintenance, operation, and furnishings. ESGP funds may be used for maintenance, operation, furnishings, and equipment costs (24 CFR §576.21(3)).

(1) Maintenance costs include contract services for copier or security system maintenance, pest control, lawn care, contracted janitorial service, etc.

(2) Operation costs include administration, equipment, furnishings, facility rent, utilities, internet service, and telephone; building maintenance and non-deferred repairs; food for shelter residents; vehicle maintenance, registration, repairs, security of facility, and fuel; building or equipment insurance; fidelity bond coverage; office and maintenance supplies; single audit expenses (if required), staff mileage reimbursement (for travel relating to ESGP service delivery), and pre-award travel expenses (for successful applicants to attend an orientation workshop).

(A) Non-deferred repairs are items that break during the contract period, such as:

(i) repairing a window that is broken;

(ii) repairs due to water damage;

(iii) repairing a broken furnace; or

(iv) repairing an air conditioning unit.

(B) Deferred repairs, classified as rehabilitation activities, are items which are inoperable or broken and in need of replacement prior to the application period.

(C) Equipment may include computers, printers, software, refrigerator, stove, tools, vehicles, etc. All equipment with a useful life of more than one year and an acquisition cost of $500 or more must be included in a cumulative inventory report submitted to the Department each contract year. (Refer to Subchapter A, General Provisions §5.8 of this chapter (relating to Inventory Report)).

(D) Subrecipients who participate in a local continuum of care may use ESGP funds to facilitate the required Homeless Management Information System (HMIS) which may include the purchase of software and/or annual access fees to facilitate data collection and reporting of client-level information.

(3) Furnishings may include beds, mattresses, linens, desks, tables, chairs, etc.

(e) Homelessness Prevention. ESGP legislation limits homelessness prevention to 30% of the total state allocation (42 U.S.C. §11374(a)).

(1) Homelessness prevention funds may be used to provide direct monetary assistance on behalf of individuals whose annual income is at or below the federal poverty guideline when the conditions referenced in 24 CFR §576.3 are met.

(A) The individual or family is unable to make the required payments due to a sudden reduction in income or a sudden increase in expenses, i.e. sudden reduction in income may result from an event that occurs no more than ninety (90) days prior to the date of application for ESGP services. Documentation should support the risk of becoming homeless such as an eviction notice or termination of utility service notice;

(B) The assistance is necessary to avoid the foreclosure, eviction, or termination of utility services (excluding telephone service); utility and rent deposit refunds from vendors must be reimbursed to the Subrecipient and not the client. Funds should be treated as program income;

(C) There is reasonable prospect that the individual or family will be able to resume the payments within a reasonable period of time (determined by the applicant organization and used consistently among all clients); and

(D) The assistance does not replace funding for pre-existing homelessness prevention activities from any other sources.

(2) Homelessness prevention funds must be used to assist those individuals and families that would actually become or remain homeless without ESGP homelessness prevention assistance (24 CFR §576.3) and include:

(A) Short-term subsidies to help defray rent and utility arrearages for families that have received a notice of eviction, termination of utility services, or payments to prevent the transfers;

(B) Security deposits or first month's rent to enable a homeless family (or individuals in emergency/transitional housing) to acquire permanent housing;

(C) Programs to provide mediation for landlord/tenant disputes;

(D) Programs to provide legal services for the representation of indigent tenants in eviction proceedings;

(E) Payments to prevent foreclosure on a home; and

(F) Other innovative programs and activities designed to prevent the incidence of homelessness.

(3) Subrecipients are required to use the ESGP homelessness prevention application to determine the eligibility of individuals and families applying for ESGP homelessness prevention assistance or utilize another application which obtains the same data. [~~(Refer to the Department's website, www.tdhca.state.tx.us, for the homelessness prevention application.)~~]

(f) Rehabilitation. Rehabilitation is defined as the labor, materials, tools, and other costs of improving buildings.

(1) Examples of allowable rehabilitation projects include, but are not limited to:

(A) accumulated deferred maintenance (replacing flooring);

(B) replacement of principle fixtures and components;

(C) improvements to increase energy efficiency (replacing a furnace or air conditioning unit); and

(D) structural changes necessary to make the facility accessible for persons with physical disabilities.

(2) Rehabilitation projects include deferred repairs for items that are inoperable or broken and in need of replacement prior to the submission of the ESGP application. Rehabilitation does not include non-deferred repairs.

(3) All rehabilitation activity funded through ESGP must occur within the existing structure, must not increase the square footage of the structure involved, and must comply with local government safety and sanitation requirements. (Refer to §504 of the Rehabilitation Act of 1973, as amended, as provided in 24 CFR §8.23(a) or (b)). Types of rehabilitation projects include conversion, major rehabilitation and renovation (24 CFR §576.3).

(g) Subrecipients expending ESGP funds for essential services must have procedures established to ensure ESGP funds are being expended for ESGP eligible clients meeting the definition of homeless as per 42 U.S.C. §11302. In cases where multiple sources of funds, including ESGP, provide services, Subrecipients must establish procedures to ensure that the ESGP proportionate share of funds expended are benefiting ESGP eligible clients. Documentation verifying program eligibility for clients served with ESGP's proportionate share of the funds expended should be maintained.

§5.310. Application Review Process.

(a) Applications may be deemed ineligible for lack of response to Department ESGP monitoring report(s) and compliance and audit issues identified by the Department.

(b) Applicants not recommended for funding will be notified in writing no later than thirty (30) days from the date that the Department obligates funds.

(c) Applications recommended for funding will be presented to the board or its designee for approval, pending the availability of ESGP funds.

(d) Applicants not selected to receive ESGP funds may request a review of their application no later than thirty (30) days after the date of the written funding notification from the Department [~~as per §1.7 of this title (relating to Staff Appeals Process)~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 18, 2010.

TRD-201006606
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: January 2, 2011
For further information, please call: (512) 475-3916

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TITLE 22. EXAMINING BOARDS

PART 14. TEXAS OPTOMETRY BOARD

CHAPTER 277. PRACTICE AND PROCEDURE

22 TAC §277.6

The Texas Optometry Board proposes amendments to §277.6, concerning the recommended amount for administrative penalties and fines.

Chris Kloeris, Executive Director, has determined that for the first five-year period the amendments are in effect there will be no fiscal implications for local government as a result of enforcing or administering the amendments. Since administrative penalties are assessed on a case by case basis, it is difficult to determine the amount of penalties imposed for any one year. For state government, however, it is estimated that additional revenue of $2,000 per year for each year of the first five years the amendments are in effect will be collected.

Mr. Kloeris also has determined that for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of enforcing the amendments will be that compliance with the Optometry Act will be increased. The amendments may impose additional costs on licensees, but only if the licensee is found to have violated the Optometry Act and relevant Texas law. No disparate impact is foreseen for small or micro businesses. Information may be submitted as comments regarding any possible disparate impact.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS

The Board does not license businesses or optometric practices, including small businesses or micro businesses. The Board licenses approximately 3,700 individuals as optometrists and therapeutic optometrists. A significant majority of these individuals do own or work in one or more of 1,000 to 3,000 optometric practices which may meet the definition of a small business. Some of these optometry practices may meet the definition of a micro business. The amendments to the administrative penalties are imposed on regulated licensees, not unregulated businesses.

ENVIRONMENT AND TAKINGS IMPACT ASSESSMENT

The board has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code §2001.0225. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The Board has determined that the proposed rule does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action, and therefore does not constitute a taking under Texas Government Code §2007.043.

Comments on the proposal may be submitted to Chris Kloeris, Executive Director, Texas Optometry Board, 333 Guadalupe Street, Suite 2-420, Austin, Texas 78701-3942. The deadline for furnishing comments is 30 days after publication in the *Texas Register.*

The amendments are proposed under the Texas Optometry Act, Texas Occupations Code, §§351.151, 351.507, 351.522, 351.551, and 351.552. The Texas Optometry Board interprets §351.151 as authorizing the adoption of procedural and substantive rules for the regulation of the optometric profession. The Board interprets §351.551 and §351.552 as authorizing the imposition of administrative penalties by the Board according to provisions set out in the Act; and §351.507 and §351.522 to require the Board to publish a standardized penalty schedule.

No other sections are affected by the amendments.

§277.6. Administrative Fines and Penalties.

(a) Based upon the criteria in this section, and in addition to the sanctions listed in subsection (e) of this section [~~(f)~~], the guideline administrative penalty or fine amount for:

(1) felony conviction: $2,000 minimum penalty for each offense ([~~Section~~] §351.501(a)(3) of the Act)

(2) misdemeanor conviction involving moral turpitude: $2,000 minimum [~~$1,000~~] penalty for each offense ([~~Section~~] §351.501(a)(3) of the Act)

(3) impaired ability to practice: $2,000 minimum [~~$1,500~~] penalty for each offense ([~~Section~~] §351.501(a)(4) of the Act)

(4) violations of the act or rules involving controlled substances: $2,000 minimum penalty for each offense ([~~Sections~~] §§351.501(a)(4) and (15), 351.358, 351.451, and 351.452 of the Act)

(5) fraud, deceit, dishonesty, or misrepresentation in the practice of optometry or in applying for license; or deceiving, defrauding, or harming the public: $2,000 minimum [~~$1,500~~] penalty for each offense ([~~Section~~] §351.501(a)(4) and (11) of the Act)

(6) gross incompetence in the practice of optometry or engaging in a pattern of practice or other behavior demonstrating a wilful provision of substandard care: $2,000 minimum [~~$1,000~~] penalty for each offense ([~~Section~~] §351.501(a)(12) and (13) of the Act)

(7) practicing or attempting to practice optometry while the license is suspended or violating the terms of a Board Order: $2,000 minimum [~~$1,000~~] penalty for each offense ([~~Section~~] §351.501(a)(8) and (17) of the Act)

(8) having the right to practice optometry suspended or revoked by a federal agency: $2,000 minimum [~~$1,000~~] penalty for each offense ([~~Section~~] §351.501(a)(10) of the Act)

(9) the guideline administrative penalty or fine amount for the following violations is a $300 minimum penalty for the first offense and $600 minimum penalty for the second offense and subsequent:

(A) Failure to report address changes to the Board as required by [~~Sections~~] §351.351 and §351.501(16) of the [~~Texas Optometry~~] Act.

(B) Failure to properly display name visible to the public as required by [~~Sections~~] §351.362 of the Act.

(C) Failure to display public interest information as required by [~~Section~~] §351.203 of the Act, and §273.9 of this title.

(D) Failure to properly release contact lens prescription as required by [~~Section~~] §353.156 of the Contact Lens Prescription Act.[~~,~~]

(E) Advertising violations, including misleading advertising as prohibited by [~~Sections~~] §351.155 and §351.403 of the Act, and §279.9 of this title.

(F) Failure to use proper professional identification as required by [~~Section~~] §104.003 of the Texas Occupations Code.

(G) Offering glasses or contact lenses as a prize or inducement as prohibited by [~~Section~~] §351.404 of the Act and §273.3 of this title.

(H) Failure of the subject of a complaint to respond within 14 days of receipt to a request letter from the Board regarding the complaint as required by §277.1 of this title.

(10) the guideline administrative penalty or fine amount for the following violations is a $1,500 minimum and $2,500 maximum [~~$750~~] penalty:

(A) Directing or allowing optical employees or owners to make appointments for a leasing licensee as prohibited by [~~Sections~~] §351.408 and §351.459 of the Act.

(B) Directing or allowing optical employees or owners to advertise for a leasing licensee or include the licensee's office in the advertising as prohibited by [~~Sections~~] §351.408 and §351.459 of the Act.

(C) Directing or allowing optical employees or owners to set the practice hours for a leasing licensee as prohibited by [~~Section~~] §351.408 of the Act.

(D) Practicing in an office not properly separated from a lessor optical as prohibited by [~~Sections~~] §§351.363, 351.364, 351.408, and 351.459 of the Act, and §279.12 of this title.

(b) In accordance with [~~Section~~] §351.551 of the [~~Texas Optometry~~] Act, administrative penalties may be assessed for violations of the Act or rule or order of the board. Either the executive director or a subcommittee of the board, to include at least one public member of the board, may assess a penalty for each violation and present a report to the board concerning the facts on which the determination was based and the amount of penalty.

(c) In accordance with [~~Section~~] §351.507 of the Act, the Investigation - Enforcement Committee shall use the guidelines in this

rule when determining the appropriate administrative penalty or fine to recommend to the board.

~~[(d) The range of penalty is $100 to $2,500 for each violation.]~~

(d) [~~(e)~~] The guidelines in this rule are intended to promote consistent sanctions for similar violations, facilitate timely resolution of cases, and encourage settlements. The guidelines in this rule apply to a single violation where there are no aggravating or mitigating factors. Multiple violations and aggravating or mitigating factors as listed in subsection (f) [~~(g)~~] of this section may justify a modification of the guideline amount. The guideline amount may be reduced when a respondent acknowledges a violation and agrees to comply with terms and conditions of an agreed order.

(e) [~~(f)~~] The guidelines in this rule apply to administrative penalties and fines. The Board may also, alone or in conjunction with imposing an administrative penalty or fine, refuse to issue a license to an applicant, revoke or suspend a license, place on probation a person whose license has been suspended, impose a stipulation, limitation, or condition relating to continued practice, including conditioning continued practice on counseling or additional education, or reprimand a licensee.

(f) [~~(g)~~] The amount of the penalty shall be based on:

(1) the seriousness of the violation, including nature, circumstances, extent, and gravity of any prohibited act, and hazard or potential hazard created to the health, safety, or economic welfare of the public;

(2) the economic harm to property or the environment caused by the violation;

(3) the history of previous violations;

(4) the amount necessary to deter future violations;

(5) efforts to correct the violation; and

(6) any other matter that justice may require.

(g) [~~(h)~~] Penalties imposed by the board pursuant to subsections (a) - (f) [~~(g)~~] of this section may be imposed for each violation subject to the following limitations:

(1) imposition of an administrative penalty not to exceed $2,500 for each violation;

(2) each day a violation continues or occurs is a separate violation for purposes of imposing a penalty.

(h) [~~(i)~~] Administrative penalties or fines for violations not specifically mentioned in this rule shall be based on an amount that corresponds to the scheme of the guidelines of this rule.

(i) [~~(j)~~] The provisions of this rule shall not be construed so as to prohibit other appropriate disciplinary action under the Act, civil or criminal action and remedy and enforcement under other laws.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 16, 2010.

TRD-201006547

Chris Kloeris
Executive Director
Texas Optometry Board
Earliest possible date of adoption: January 2, 2011
For further information, please call: (512) 305-8502

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PART 21. TEXAS STATE BOARD OF EXAMINERS OF PSYCHOLOGISTS

CHAPTER 465. RULES OF PRACTICE

22 TAC §465.38

The Texas State Board of Examiners of Psychologists proposes amendments to §465.38, Psychological Services for Public Schools. The amendments would allow an LSSP to use the title National Certified School Psychologist (NCSP) if the LSSP holds this certification.

Sherry L. Lee, Executive Director, has determined that for the first five-year period the amendments will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed amendments.

Ms. Lee also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to help the Board protect the public. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Brenda Skiff, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, TX 78701, (512) 305-7700 or email brenda.skiff@tsbep.state.tx.us within 30 days of publication of this proposal in the *Texas Register.*

The amendments are proposed under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

No other code, articles or statutes are affected by this section.

§465.38. Psychological Services for Public Schools.

This rule acknowledges the unique difference in the delivery of school psychological services in the public schools from psychological services in the private sector. The Board recognizes the purview of the State Board of Education and the Texas Education Agency in safeguarding the rights of public school children in Texas. The mandated multidisciplinary team decision making, hierarchy of supervision, regulatory provisions, and past traditions of school psychological service delivery both nationally and in Texas, among other factors, allow for rules of practice in the public schools which reflect these occupational distinctions from the private practice of psychology.

(1) Definition.

(A) The specialist in school psychology license permits the licensee to provide school psychological services in Texas public schools.

(B) A licensed specialist in school psychology (LSSP) means a person who is trained to address psychological and behavioral problems manifested in and associated with educational systems

by utilizing psychological concepts and methods in programs or actions which attempt to improve the learning, adjustment and behavior of students. Such activities include, but are not limited to, addressing special education eligibility, conducting manifestation determinations, and assisting with the development and implementation of individual educational programs.

(C) The assessment of emotional or behavioral disturbance, for educational purposes, using psychological techniques and procedures is considered the practice of psychology.

(2) Titles. The correct title for persons holding this license is Licensed Specialist in School Psychology or LSSP. Only individuals who meet the requirements of §465.6 of this title (relating to Listings, Public Statements and Advertisements, Solicitation, and Specialty Titles) may refer to themselves as School Psychologists. No individual may use the title Licensed School Psychologist. An LSSP who has achieved certification as a Nationally Certified School Psychologist (NCSP) may use this credential along with the license title of LSSP.

(3) Providers of School Psychological Services. School psychological services may be provided in Texas public schools only by individuals authorized by this Board to provide such services. Individuals who may provide such school psychological services include LSSPs and interns or trainees as defined in §463.9 of this title (relating to Licensed Specialist in School Psychology). Nothing in this rule prohibits public schools from contracting with licensed psychologists and licensed psychological associates who are not LSSPs to provide psychological services, other than school psychology, in their areas of competency. School districts may contract for specific types of psychological services, such as clinical psychology, counseling psychology, neuropsychology, and family therapy, which are not readily available from the licensed specialist in school psychology employed by the school district. Such contracting must be on a short term or part time basis and cannot involve the broad range of school psychological services listed in paragraph (1)(B) of this section. An LSSP who contracts with a school district to provide school psychological services may not permit an individual who does not hold a valid LSSP license to perform any of the contracted school psychological services.

(4) Supervision.

(A) Direct, systematic, face-to-face supervision must be provided to:

(i) Interns as defined in §463.9 of this title.

(ii) Individuals who meet the training requirements of §463.9 of this title and who have passed the National School Psychology Examination at the Texas cutoff score or above and who have been notified in writing of this status by the Board. These individuals may practice under supervision in a Texas public school district for no more than one calendar year. They must be designated as trainees.

(iii) LSSPs for a period of one academic year following licensure unless the individual also holds licensure as a psychologist in Texas. This supervision may be waived for individuals who legally provided full-time, unsupervised school psychological services in another state for a minimum of three academic years immediately preceding application for licensure in Texas as documented by the public schools where services were provided and who graduated from a training program approved by NASP or accredited in school psychology by APA or who hold NCSP certification.

(iv) LSSPs when the individual is providing psychological services outside his or her area of training and supervised experience.

(B) Nothing in this rule applies to administrative supervision of psychology personnel within Texas public schools, performed by non-psychologists, in job functions involving, but not limited to, attendance, time management, completion of assignments, or adherence to school policies and procedures.

(5) Supervisor Qualifications. Supervision may only be provided by a LSSP, who has a minimum of three years of experience providing psychological services in the public schools of this or another state. To meet supervisor qualifications, a licensee must be able to document the required experience by providing documentation from the authority that regulates the provision of psychological services in the public schools of that state and proof that the licensee provided such services, documented by the public schools in the state in which the services were provided. Any licensed specialist in school psychology may count one full year as an intern or trainee as one of the three years of experience required to perform supervision.

(6) Conflict Between Laws and Board Rules. In the event of a conflict between state or federal statutes and Board rules, state or federal statutes control.

(7) Compliance with Applicable Education Laws. LSSPs shall comply with all applicable state and federal laws affecting the practice of school psychology, including, but not limited to:

(A) Texas Education Code;

(B) Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. §1232q;

(C) Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et seq;

(D) Texas Public Information Act ("Open Records Act"), Texas Government Code, Chapter 552;

(E) Section 504 of the Rehabilitation Act of 1973.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 18, 2010.

TRD-201006584
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: January 2, 2011
For further information, please call: (512) 305-7706

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PART 22. TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY

CHAPTER 501. RULES OF PROFESSIONAL CONDUCT

SUBCHAPTER B. PROFESSIONAL STANDARDS

22 TAC §501.63

The Texas State Board of Public Accountancy (Board) proposes new §501.63, concerning Financial Statement Standards.

Proposed new rule §501.63 will clarify when and how professional standards apply to the preparation of a financial statement by a licensee.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed new rule will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the new rule will be none.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the new rule will be none.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the new rule will be none.

Mr. Treacy has determined that for the first five-year period the new rule is in effect the public benefits expected as a result of adoption of the proposed new rule will be a better understanding as to the professional standards that apply in the preparation of a financial statement by a licensee.

The probable economic cost to persons required to comply with the new rule will be insignificant

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed new rule will not affect a local economy.

Mr. Treacy has determined that the proposed new rule will not have an adverse economic effect on small businesses because the new rule does not impose any duties or obligations upon small businesses.

Mr. Treacy has determined that an Economic Impact Statement and a Regulatory Flexibility Analysis are not required because the proposed new rule will not adversely affect small or micro businesses.

The Board requests comments on the substance and effect of the proposed rule from any interested person. Comments must be received at the Board no later than noon on January 3, 2011. Comments should be addressed to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854.

The Board specifically invites comments from the public on the issues of whether or not the proposed new rule will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted, finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

The new rule is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed new rule.

§501.63. Financial Statement Standards.

(a) A licensee who is an employee or officer of a business entity or governmental agency may prepare the business entity's or governmental agency's financial statements and may issue non-attest transmittals or information regarding non-attest transmittals if the transmittals or information do not purport to be in compliance with standards for accounting and review services adopted by the AICPA or another national accountancy organization recognized by the board.

(b) A licensee who is not an employee or officer of a business entity or governmental agency shall not submit the business entity's or governmental agency's financial statements to a client or third party unless the person complies with the Statements on Standards for Accounting and Review Services (SSARS) issued by the AICPA and other professional standards adopted by the board.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 18, 2010.

TRD-201006592
J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: January 2, 2011
For further information, please call: (512) 305-7842

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SUBCHAPTER C. RESPONSIBILITIES TO CLIENTS

22 TAC §501.75

The Texas State Board of Public Accountancy (Board) proposes an amendment to §501.75, concerning Confidential Client Communications.

The amendment to §501.75 will track the language found in the Public Accountancy Act to identify an exception requiring a CPA to disclose client communications in response to an IRS and SEC summons.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendment will be none.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendment will be none.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendment will be none.

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be a clarification of the client communication disclosure requirements for licensees.

The probable economic cost to persons required to comply with the amendment will be insignificant.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses because the amendment does not impose any duties or obligations upon small businesses.

Mr. Treacy has determined that an Economic Impact Statement and a Regulatory Flexibility Analysis are not required because the proposed amendment will not adversely affect small or micro businesses.

The Board requests comments on the substance and effect of the proposed rule from any interested person. Comments must be received at the Board no later than noon on January 3, 2011. Comments should be addressed to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted, finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§501.75. Confidential Client Communications.

Except by permission of the client or the authorized representatives of the client, a person or any partner, officer, shareholder, or employee of a person shall not voluntarily disclose information communicated to him by the client relating to, and in connection with, professional accounting services or professional accounting work rendered to the client by the person. Such information shall be deemed confidential. However, nothing herein shall be construed as prohibiting the disclosure of information required to be disclosed under a summons under the provisions of the Internal Revenue Code of 1986 and its subsequent amendments, the Securities Act of 1933 (15 U.S.C. Section 77a et seq.) and its subsequent amendments, or the Securities Exchange Act of 1934 (15 U.S.C. Section 78a et seq.) and its subsequent amendments, by the standards of the public accounting profession in reporting on the examination of financial statements or as prohibiting disclosures pursuant to a court order signed by a judge, a congressional or grand jury subpoena, investigations or proceedings under the Act, ethical investigations conducted by private professional organizations, or in the course of peer reviews.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 18, 2010.

TRD-201006589
J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: January 2, 2011
For further information, please call: (512) 305-7842

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CHAPTER 519. PRACTICE AND PROCEDURE
SUBCHAPTER C. PROCEEDINGS AT SOAH

22 TAC §519.41

The Texas State Board of Public Accountancy (Board) proposes new §519.41, concerning Disciplinary Powers of the Board.

Proposed new rule §519.41 will identify the disciplinary powers of the Board derived from the Public Accountancy Act and will clarify the restrictions of a licensee during the term of the licensee's suspension.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed new rule will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the new rule will be none.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the new rule will be none.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the new rule will be none.

Mr. Treacy has determined that for the first five-year period the new rule is in effect the public benefits expected as a result of adoption of the proposed new rule will be a clarification of the board's disciplinary powers and an understanding of the restrictions that a suspension imposes on a licensee.

The probable economic cost to persons required to comply with the new rule will be insignificant.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed new rule will not affect a local economy.

Mr. Treacy has determined that the proposed new rule will not have an adverse economic effect on small businesses because the new rule does not impose any duties or obligations upon small businesses.

Mr. Treacy has determined that an Economic Impact Statement and a Regulatory Flexibility Analysis are not required because the proposed new rule will not adversely affect small or micro businesses.

The Board requests comments on the substance and effect of the proposed rule from any interested person. Comments must be received at the Board no later than noon on January 3, 2011. Comments should be addressed to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854.

The Board specifically invites comments from the public on the issues of whether or not the proposed new rule will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted, finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

The new rule is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed new rule.

§519.41. Disciplinary Powers of the Board.

(a) On a determination that a ground for discipline exists under the *Public Accountancy Act,* the board may:

(1) revoke a certificate, firm license, or practice privilege issued under this title;

(2) suspend under any terms a certificate, firm license, practice privilege, or license issued under this title for a period not to exceed five years;

(3) refuse to renew a license;

(4) place a license holder on probation;

(5) reprimand a license holder;

(6) limit the scope of a license holder's practice;

(7) require a license holder to complete a peer review program conducted in the manner prescribed by the board;

(8) require a license holder to complete a continuing education program specified by the board;

(9) impose on a license holder the direct administrative costs incurred by the board in taking action under paragraphs (1) through (8) of this subsection;

(10) require a license holder to pay restitution as provided by §901.6015 of the *Public Accountancy Act;*

(11) impose an administrative penalty under Subchapter L of the *Public Accountancy Act;* or

(12) impose any combination of the sanctions provided by this subsection.

(b) If a person's license suspension is probated, the board may require the person to:

(1) report regularly to the board on matters that are the basis of the probation;

(2) limit practice to the areas prescribed by the board; or,

(3) continue or renew professional education until the license holder attains a degree of skill satisfactory to the board in those areas that are the basis of the probation.

(c) The following applies to a CPA that has been suspended from the practice of public accountancy:

(1) The suspended licensee may not continue to provide accounting related services to the public as a CPA.

(2) The suspended licensee's name must be removed from any firm name licensed with the board, within 90 days of the board order suspending the license.

(3) The suspended licensee may perform accounting related services as a non-licensee employee of a licensed CPA firm or as an employee of a business not providing accounting services to the public but may not use the CPA credential during the term of the suspension.

(4) A suspended licensee remains a certificate holder and is subject to the board's rules of professional conduct.

(5) Licensing fees do not accrue during the term of a non-administrative suspension or revocation and are not owed to the board upon reinstatement.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 18, 2010.

TRD-201006593
J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: January 2, 2011
For further information, please call: (512) 305-7842

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CHAPTER 520. PROVISIONS FOR THE FIFTH-YEAR ACCOUNTING STUDENTS SCHOLARSHIP PROGRAM

22 TAC §520.2

The Texas State Board of Public Accountancy (Board) proposes an amendment to §520.2, concerning Definitions.

The amendment to §520.2 will define the term gift aid and clarifies that assistantships and work-study programs are not elements of gift aid.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendment will be none.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendment will be none.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendment will be none.

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be a clarification

of eligibility requirements for the Fifth Year Accounting Students Scholarship Program.

The probable economic cost to persons required to comply with the amendment will be insignificant.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses because the amendment does not impose any duties or obligations upon small businesses.

Mr. Treacy has determined that an Economic Impact Statement and a Regulatory Flexibility Analysis are not required because the proposed amendment will not adversely affect small or micro businesses.

The Board requests comments on the substance and effect of the proposed rule from any interested person. Comments must be received at the Board no later than noon on January 3, 2011. Comments should be addressed to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted, finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§520.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Cost of attendance--An estimate of the expenses incurred by a typical financial aid student in attending a particular college or university. It includes direct educational costs (tuition, fees, books, and supplies) as well as indirect costs (room and board, transportation, and personal expenses).

(2) Expected family contribution--The amount of discretionary income that should be available to a student from his or her resources and that of his or her family, as determined by the US Department of Education Definition of Expected Family Contribution.

(3) Financial need--The cost of attendance at a particular public or private institution of higher education less the expected family contribution. The cost of attendance and family contribution are to be determined in accordance with board guidelines.

(4) Gift Aid--Educational funds from state, federal, and other sources, such as grants, that do not require repayment from present or future earnings. Assistantships and work-study programs are not considered to be gift aid.

(5) [~~(4)~~] Half-time student--For undergraduates, a person who is enrolled or is expected to be enrolled for the equivalent of at least six but not more than nine semester credit hours. For graduate students, a person who is enrolled or is expected to be enrolled for the equivalent of 4.5 but not more than six semester credit hours.

(6) [~~(5)~~] Institution--Public and private or independent institutions of higher education as defined in Texas Education Code, §61.003.

(7) [~~(6)~~] Period of enrollment--The term or terms within the current state fiscal year (September 1 - August 31) for which the student was enrolled in an approved institution and met all the eligibility requirements for an award through the program described in this chapter.

(8) [~~(7)~~] Program Officer--The individual named by each participating institution's chief executive officer to serve as agent for the board. The Program Officer has primary responsibility for all ministerial acts required by the program, including maintenance of all records and preparation and submission of reports reflecting program transactions. Unless otherwise indicated by the administration, the director of student financial aid shall serve as Program Officer.

(9) [~~(8)~~] Resident of Texas--A resident of the State of Texas as determined in accordance with 19 TAC Chapter 21, Subchapter B (relating to Determination of Resident Status and Waiver Programs for Certain Nonresident Persons). Nonresident students who are eligible to pay resident tuition rates are not residents of Texas.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 18, 2010.

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J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
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For further information, please call: (512) 305-7842

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CHAPTER 523. CONTINUING PROFESSIONAL EDUCATION
SUBCHAPTER C. ETHICS RULES: INDIVIDUALS AND SPONSORS

22 TAC §523.130

The Texas State Board of Public Accountancy (Board) proposes an amendment to §523.130, concerning Ethics Course Requirements for Licensees.

The amendment to §523.130 will make it clear that licensees may take ethics courses in a self-study, interactive format.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendment will be none.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendment will be none.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendment will be none.

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be a clarification of the existing rule to allow self-study interactive Continuing Professional Education classes.

The probable economic cost to persons required to comply with the amendment will be insignificant.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses because the amendment does not impose any duties or obligations upon small businesses.

Mr. Treacy has determined that an Economic Impact Statement and a Regulatory Flexibility Analysis are not required because the proposed amendment will not adversely affect small or micro businesses.

The Board requests comments on the substance and effect of the proposed rule from any interested person. Comments must be received at the Board no later than noon on January 3, 2011. Comments should be addressed to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted, finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§523.130. Ethics Course Requirements for Licensees.

(a) A candidate applying for certification or registration must complete a board-approved four hour ethics course designed to thoroughly familiarize the applicant with the board's Rules of Professional Conduct no more than six months prior to submission of the application. Proof of completion of this course must be submitted with the application.

(b) A licensee must take a four hour ethics course that has been approved by the board pursuant to §523.131 of this title (relating to Board Approval of Ethics Course Content) every two years. Licensees shall report completion of the course on the annual license renewal notice at least every second year.

(c) A licensee granted retired, permanent disability, or other exempt status is not required to complete the ethics course during the licensee's exempt status. When the exempt status is no longer applicable, the licensee must complete an ethics course approved by the board and report it on the annual license renewal notice if due.

(d) A licensee must take the ethics course in a live instructor format or in a self-study interactive format [~~as defined in §523.102(c)(1) of this title (relating to CPE Purpose and Definitions)~~].

(e) A person who does not reside in the state of Texas, who has no clients within this state, and who is current with the ethics course requirements of his state of residence is not required to take the ethics course mandated by this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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J. Randel (Jerry) Hill
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Texas State Board of Public Accountancy
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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 21. TRADE PRACTICES

SUBCHAPTER P. MENTAL HEALTH PARITY

28 TAC §§21.2401 - 21.2407

The Texas Department of Insurance proposes amendments to Subchapter P, §§21.2401 - 21.2407, concerning requirements for parity between mental health or substance use disorder benefits and medical/surgical benefits. The amendments are necessary to implement the federal Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA), which was enacted October 3, 2008, as sections 511 and 512 of the Tax Extenders and Alternative Minimum Tax Relief Act of 2008 (Public Law 110-343, Division C) (122 Stat. 3881). The MHPAEA amends the Employee Retirement Income Security Act of 1974 (ERISA), at 29 USCA §1185a; the Public Health Service Act (PHS Act), at 42 USCA §300gg-5; and the Internal Revenue Code of 1986 (Code), at 26 USCA §9812. Enactment of Public Law 111-148, the Patient Protection and Affordable Care Act of 2010 (PPACA) results in reclassifying 42 USCA §300gg-5 to 42 USCA §300gg-26.

The proposed amendments also are necessary to allow the Department to maintain state regulatory authority over health plan issuers that issue coverage to group health plans in Texas, as required by §1501.010 of the Insurance Code.

The MHPAEA became effective in terms of application to group health plans for plan years beginning after October 3, 2009. The Act preempts state law regarding mental health and substance use disorder coverage to the extent that such state law prevents the application of a requirement of the MHPAEA. Moreover, the Act requires full parity if coverage is included in a health benefit plan. The Act does not, however, require that such coverage be included in a health benefit plan.

For plans that offer mental health or substance use disorder benefits, MHPAEA requires group health plans and group health plan issuers to ensure that financial requirements such as copayments or deductibles and treatment limitations such as visit limits applicable to mental health or substance use disorder benefits are no more restrictive than the predominant financial requirements or treatment limitations applied to substantially all medical/surgical benefits. The term *predominant* is defined as the most common or frequent of such type of limitation or requirement.

On April 15, 2010, the Department posted on its website, for informal comment, the draft rule text and cost note estimates. On April 29, 2010, the Department held a public meeting to receive oral informal comments on the draft rule text and the note of estimated costs. None of the comments directed to the rule text posted for informal comment resulted in change to that text.

The proposed amendments to the subchapter set forth rules for health plan issuers that provide coverage to group health plans affected by the MHPAEA, to assure that the coverage offered by those group health plans will be in compliance with the federal statute.

Section 21.2401 states the purpose and scope of the subchapter, and proposed amendments identify by date of issuance or renewal of the health plan issuers' coverage to which the sections apply. The proposed amendments to the section also state that the Patient Protection and Affordable Care Act of 2010 (PPACA), Public Law 111-148, and any federal regulations promulgated pursuant to its provisions apply to group health plan coverage delivered, issued or renewed for a plan year beginning on or after the date of PPACA enactment.

Section 21.2402 defines the terms used in the subchapter. Conforming amendments to the definitions of the terms *aggregate lifetime limit, annual limit, base period, coverage, group health plan, and mental health benefits* are proposed. The definitions of *incurred expenditures* and *medical/surgical benefits* are amended to include reference to substance use disorder benefits. The term *mental health benefits* contains conforming amendments and further is amended to remove exclusion of benefits for treatment of substance abuse or chemical dependency. New definitions for the terms *financial requirement, health plan issuer, large employer, predominant, small employer, substance use disorder benefits,* and *treatment limitation* are included in the amendments to the section. The term health plan issuer is defined to include all providers of group health insurance coverage, group health care coverage or group health benefit coverage that are regulated under the Insurance Code.

Proposed amendments to §21.2403 change the section heading to indicate that it addresses large employer health plan parity requirements. Proposed amendments to §21.2403 provide a working, applicational definition of the term "substantially all" in relation to the medical benefits covered by a group health plan, or within a classification of benefits in a group health plan, as applicable. For purposes of the section, "substantially all" means at least two-thirds of all medical benefits covered by the group health plan, or within such classification of benefits, as applicable. Proposed amendments to the section make conforming references to *health plan issuer* to describe an entity issuing a group health plan, as well as conforming additional references to substance use disorder benefits at each reference location of the term *mental health benefits.* Proposed amendments to §21.2403(a) add a new paragraph (5) to provide that financial requirements must be no more restrictive for mental health or substance use disorder benefits than the predominant financial requirements applied to substantially all medical and surgical benefits covered by the group health plan. The proposed amendments to the subsection add a new paragraph (6) to provide that treatment limitations must be no more restrictive for mental health or substance use disorder benefits than the predominant treatment limitations applied to substantially all medical and surgical benefits covered by the group health plan. Proposed amendments to §21.2403(a) add a new paragraph (7) to prohibit separate cost-sharing requirements or separate treatment limitations that are applicable only with respect to mental health or substance use disorder benefits. The proposed amendments to the subsection add a new paragraph (8) to provide that for purposes of the section, whether a financial requirement or treatment limitation is a predominant financial requirement or treatment limitation that applies to substantially all medical/surgical benefits in a classification is determined separately for each type of financial requirement or treatment limitation. The proposed amendments then set forth the classifications to be utilized in applying the provisions of this subsection. Proposed amendments to §21.2403 add a new subsection (c) to provide that if a large employer group health plan provides both medical and surgical benefits and mental health or substance use disorder benefits, utilization review for mental health or substance use disorder benefits shall be conducted in accordance with provisions of the Insurance Code Chapter 4201. The proposed amendments to the section also add a new subsection (d) to provide that if a large employer group health plan provides both medical and surgical benefits and mental health or substance use disorder benefits and the plan provides coverage for medical and surgical benefits provided by out-of-network providers, the plan also must provide coverage for mental health or substance use disorder benefits provided by and services performed by out-of-network providers. Proposed amendments to §21.2403 add a new subsection (e) to require that regardless of whether a large employer group health plan provides both medical and surgical benefits and mental health or substance use disorder benefits, it must nonetheless provide coverage for treatment of serious mental illness, based on medical necessity, for no fewer than 45 days of inpatient treatment and no fewer than 60 visits for outpatient treatment in accordance with the Insurance Code Chapter 1355 and subsection (b)(1) of the proposed amended section. The proposed amendments to the section also add a new subsection (f) to require that pursuant to the Insurance Code Chapter 1368 and in accordance with subsection (b)(1) of the section, a large employer group health plan must provide coverage for the necessary care and treatment of chemical dependency in accordance with minimum standard requirements set forth in §§1368.004 - 1368.006(a) and §1368.007, and Chapter 3, Subchapter HH of this title (relating to Standards for Reasonable

Cost Control and Utilization Review for Chemical Dependency Treatment Centers).

Proposed amendments to §21.2404 change the section heading to indicate that it addresses small employer health plan parity requirements. Proposed amendments to the section also make conforming references to *health plan issuer* to describe an entity issuing a group health plan. Proposed amendments to §21.2404(b) replace existing text with proposed new text to require that, notwithstanding provisions in subsection (a) stating that the subchapter does not apply to a health plan issuer with respect to a plan year of a small employer, a health plan issuer must offer coverage for serious mental illness as described in the Insurance Code §1355.004, and that if the employer accepts the coverage, such coverage must meet the requirements of §1355.004. The proposed amendments to the section also add a new subsection (c) to require that, notwithstanding provisions in subsection (a) stating that the subchapter does not apply to a health plan issuer with respect to a plan year of a small employer, a health plan issuer must nonetheless provide coverage for substance use disorder that meets the minimum coverage requirements of the Insurance Code Chapter 1368.

Proposed amendments to §21.2405 add a new subsection (a) to provide that a health plan issuer's coverage is not subject to the large-employer parity requirements described in §21.2403 if such issuer demonstrates an increase in the cost for such coverage in accordance with the section. The proposed amendments to the section redesignate existing subsection (a) as subsections (b) and (c). The proposed amendments add new paragraphs (1) and (2) to subsection (b) as redesignated to provide that the issuer must demonstrate with actual data that application of the subchapter results in an increased cost of coverage of at least two percent in the first plan year in which it was applied and at least one percent in subsequent years. The proposed amendments add new paragraphs (1) and (2) to subsection (c) as redesignated to provide that the base period for increased cost measure is six months, within which period the coverage must comply with the provisions of the subchapter. The proposed amendments redesignate existing subsection (b) as subsection (d) and add text to that subsection as redesignated to provide that the determination of increases to actual costs must be made and certified by a qualified, licensed actuary who is a member in good standing of the American Academy of Actuaries. The proposed amendments delete Figure: 28 TAC §21.2405(b) from existing subsection (b). The proposed amendments delete text to existing subsection (c).

In addition, the proposed amendments to §21.2405 add a new subsection (e) to require that a health plan issuer that qualifies for and elects to implement the exemption must promptly notify the Department, as well as the federal Secretary of Health and Human Services, and the beneficiaries in the plan of such election. The proposed amendments to the section redesignate existing subsection (d) as subsection (f), redesignate existing subsection (e) as subsection (g) and delete text to existing subsection (f).

Finally, the proposed amendments to the section add a new subsection (h) to provide that an employer may elect to continue to apply mental health and substance use disorder parity with respect to the health plan for which the determination is made regardless of any increase in total costs.

A proposed amendment to §21.2406 conforms the reference to a health plan issuer.

Proposed amendments to §21.2407 provide that a health plan issuer may not sell coverage that does not meet the large-employer parity requirements described in §21.2403 unless such coverage meets the small employer parity requirements addressed in §21.2404, or the criteria relating to the cost-of-coverage exemption set forth in §21.2405.

FISCAL NOTE. Katrina Daniel, Senior Associate Commissioner of Life, Health, and Licensing, has determined that for each year of the first five years the proposed amended sections will be in effect there will be no fiscal impact to state or local governments as a result of the enforcement or administration of the rule amendments. There will be no measurable effect on local employment or the local economy as a result of the proposal.

PUBLIC BENEFIT/COST NOTE. Ms. Daniel also has determined that for each year of the first five years the amended sections are in effect, the public benefit anticipated as a result of the proposed amended sections will be that persons receiving mental health or substance use disorder benefits through a health plan issuer providing coverage to a group health plan will receive, with respect to those mental health or substance use disorder benefits, parity with medical/surgical benefits in annual dollar and aggregate lifetime benefit limits. Moreover, the Department will retain its authority to regulate health plan issuers providing coverage to group health plans in Texas, which authority would be preempted by federal regulation under HIPAA if these sections are not amended.

Further, Ms. Daniel estimates that the costs to comply with this subchapter if the proposed amendments are adopted will result from the federal legislative enactment of the MHPEA, rather than from adoption of the proposed amended rules, as the Act requires group health plans and group health plan issuers to ensure that financial requirements and treatment limitations applicable to mental health or substance use disorder benefits offered under a group health plan are no more restrictive than the predominant financial requirements or treatment limitations applied to substantially all medical/surgical benefits. However, the Act also contains provisions that clearly indicate that the Act itself does not require a group health plan or group health plan issuer to provide any mental health or substance disorder benefits.

The Department estimates that the potential costs of compliance with the rule will involve the removal of current mental health and substance use disorder language from policy documents, the addition of new language in policy documents, and the prospective potential increases in administration costs associated with the removal of the language.

Anticipated Cost Components and Costs. The Department anticipates that most health plan issuers have already chosen to file one or more endorsements with the Department to be attached to their policy forms to override the mental health and substance use disorder language in the forms. Some health plan issuers might not have filed such endorsements and will need to do so after the proposed amendments are adopted.

1.Filing fees. The filing fees are $100 for forms subject to review and $50 for forms exempt from review, such as health policies. It is anticipated that if a health plan issuer does not file a single endorsement for use with all policies, the number of re-filings per health plan issuer will depend on the size of the health plan issuer. A large health plan issuer may have dozens of forms impacted, whereas a smaller health plan issuer may have very few forms. Therefore, it is anticipated that large health plan issuers

could incur the highest costs as a result of the proposed amendments.

2.Administrative costs. Additionally, health plan issuers will incur administrative costs through the use of staff time in preparing and sending the filings to the Department. The Department anticipates that various types of employees may be involved in the process of revising forms or drafting endorsements and filing them with the Department. In total, the Department estimates that on average two to 10 total employee hours will be necessary to prepare each filing with the Department. The Department anticipates that the types of employees that may be involved include operations managers, supervisors, and office clerks. According to wage data obtained from the Texas Workforce Commission website, the average salary of an operations manager working at an insurance carrier in Texas is $56.50 per hour, the average salary of a supervisor is $25.53 per hour, and the average salary of an office clerk is $12.21. Accordingly, the Department estimates the administrative cost of filing at between $24.42 and $565 per form.

The Department is unaware of any other costs that health plan issuers would incur as a result of the changed requirements related to mental health and substance use disorder benefits.

In its April 15, 2010 posting, the Department estimated the cost of the proposed amendments, consistent with the costs described in this Public Benefit/Cost Note, and sought additional information on its cost estimates and components. On April 29, 2010, the Department held a public meeting to receive oral informal comments on the draft rule text and the note of estimated costs. The Department has not received any information adding to or conflicting with its cost estimates either from issuers or from association representatives of such issuers.

The Department has determined that any effect of the amendments to these sections on small businesses subject to the federal law and this subchapter results from the federal legislative enactment of the MHPAEA and the statutory requirement in §1501.010 of the Insurance Code to adopt such federal requirements by rule. In addition, total cost to a health plan issuer is not dependent upon the size of the issuer, but rather is dependent upon that issuer's number of enrollees under the affected health benefit plans and the number of employers seeking exemptions.

Both small and micro businesses as well as the largest businesses affected by the proposed amendments will incur the same cost per unit. The cost per hour of labor should not vary between the smallest and largest businesses, based on the types of forms or systems that will require either modification or creation, and the nature of technical requirements associated with creating or updating such forms or systems. Total costs for both a small business and the largest business will depend on the percentage of applicants or insured groups for which such issuers will have to create or modify forms or systems.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. The Government Code §2006.002(c) requires that if a proposed rule may have an economic impact on small businesses, state agencies must prepare as part of the rulemaking process an economic impact statement that assesses the potential impact of the proposed rule on small or micro businesses and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule. The Government Code §2006.001(2) defines "small business" as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit; is independently owned and operated, and has fewer than 100 employees or less than $6 million in annual gross receipts. The Government Code §2006.001(1) defines "micro business" similarly to "small business" but specifies that such a business may not have more than 20 employees. The Government Code §2006.001(1) does not specify a maximum level of gross receipts for a "micro business." The Government Code §2006.002(f) requires a state agency to adopt provisions concerning micro businesses that are uniform with those provisions outlined in the Government Code §2006.002(b) - (d) for small businesses.

In accordance with the Government Code §2006.002(c), the Department has determined that the proposed amended sections if adopted might have an adverse economic effect on 10 - 40 health plan issuers that qualify as small or micro businesses under the Government Code §2006.001(1) and (2) and that would be required to comply with the proposed amended sections if they offered plans that provide mental health or substance use disorder benefits.

The estimated number of small and micro businesses is based on an analysis of the financial data collected by the Department, such as the annual gross premiums of large and small employer health benefit plan issuers and on self-reporting by preferred provider benefit plan issuers regarding whether they qualify as small businesses. The potential adverse economic impact will result from the necessary costs incurred to comply with this proposal that are discussed in the Public Benefit/Cost Note part of this proposal for health plan issuers.

Section 2006.002(c)(2) requires a state agency, before adopting a rule that may have an adverse economic effect on small businesses, to prepare a regulatory flexibility analysis that includes the agency's consideration of alternative methods of achieving the purpose of the proposed rule.

Section 2006.002(c-1) requires that the regulatory analysis "consider, if consistent with the health, safety, and environmental welfare of the state, using regulatory methods that will accomplish the objectives of applicable rules while minimizing adverse impacts on small businesses."

As described and indicated in the Public Benefit/Cost Note portion of this proposal, the costs incurred by health plan issuers to comply with the proposed amendments with respect to a plan providing coverage for mental health or substance use disorder benefits are the direct result of federal legislative enactment of the MHPAEA. The Act creates the requirement that group health plans and group health plan issuers ensure that financial requirements and treatment limitations applicable to mental health or substance use disorder benefits offered under a group health plan are no more restrictive than the predominant financial requirements or treatment limitations applied to substantially all medical/surgical benefits. Conversely, and also as noted in the Public Benefit/Cost Note portion of this proposal, the Act also contains provisions that clearly indicate that the Act itself does not require a group health plan or group health plan issuer to provide any mental health or substance disorder benefits.

The Department considered regulatory alternatives for achieving the purpose of the MHPAEA and the proposed rule amendments to minimize any adverse impact on the estimated 10 - 40 large or small employer health benefit plan issuers that qualify as small or micro businesses under the Government Code §2006.001(1) and (2).

The fundamental purpose of the MHPAEA is to achieve substantial parity between medical/surgical benefits and mental health/substance use disorder benefits for group health plans with more than 50 employees.

Alternative methods considered by the Department were whether to fully or partially exempt small or micro business health plan issuers from the requirements of the proposed amendments. The Department rejected both alternatives because either of them would frustrate the fundamental purpose of the MHPAEA, and in so doing would create a regulatory standard clearly inconsistent with the requirements of the federal law. One result of implementing either alternative would have been the activation of federal preemption provisions of the MHPAEA, which apply to a state law to the extent that such state law prevents the application of a requirement of the MHPAEA.

For reasons set out in this part, the Department has determined, in accordance with the Government Code §2006.002, that regardless of the economic effect, it is neither legal nor feasible to waive or modify the requirements of the proposed rule amendments for small or micro businesses because the proposed amendments are required by federal statute. State waiver or partial waiver of such requirements would result in improper differentiation of coverage for benefits between individuals covered under plans which provide mental or substance use disorder benefits issued by small and micro issuers, compared to the same or similar plans issued by large issuers. The referenced differentiation would activate federal preemption to the extent that such a regulatory alternative would prevent application of a requirement of the MHPAEA.

TAKINGS IMPACT ASSESSMENT. The Department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on January 3, 2011, to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comment must be submitted simultaneously to Doug Danzeiser, Deputy Commissioner for Regulatory Matters, Life, Health, and Licensing Program, Mail Code 107-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Any request for a public hearing should be submitted separately to the Office of the Chief Clerk before the close of the public comment period. If a hearing is held, written and oral comments presented at the hearing will be considered.

STATUTORY AUTHORITY. The amendments are proposed under the Insurance Code Chapters 843, 846, 1251 and 1501, and §36.001. Chapter 843 addresses health maintenance organizations. Section 843.151 provides that the Commissioner may adopt reasonable rules as necessary and proper to meet the requirements of federal law and regulations. Chapter 846 relates to certain multiple employer welfare arrangements. Section 846.005 requires the Commissioner to adopt rules necessary to meet the minimum requirements of federal law and regulations. Chapter 1251 addresses group and blanket health insurance. Section 1251.008 provides that the Commissioner may adopt rules necessary to administer the chapter. Chapter 1501 implements provisions regarding small and large employers which were necessary to comply with the federal requirements contained in the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA). Section 1501.010 requires the Commissioner to adopt rules necessary to implement Chapter 1501, and to meet the minimum requirements of federal law, including regulations, which for small and large employer health plan issuers are contained in HIPAA and in regulations adopted by federal agencies to implement HIPAA. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE. The following chapters are affected by this proposal: Insurance Code Chapters 843, 846, 1251, and 1501

§21.2401. Purpose and Scope.

The purpose of this subchapter is to coordinate the requirements of Texas law with federal law requiring parity between certain mental health or substance use disorder benefits and medical/surgical benefits.

(1) This subchapter applies to health plan issuers [~~carriers~~] providing, as allowed by law, coverage to group health plans for both medical/surgical benefits and mental health or substance use disorder benefits, which is delivered, issued for delivery, or renewed on or after October 3, 2009 [~~January 1, 1998~~].

(2) Coverage to group health plans delivered, issued for delivery, or renewed prior to October 3, 2009 is subject to the provisions of this subchapter in effect at the time such plans were delivered, issued for delivery, or renewed.

(3) Notwithstanding the provisions of this subchapter, coverage to group health plans delivered, issued for delivery, or renewed for a plan year beginning on or after the date of enactment of Public Law 111-148, the Patient Protection and Affordable Care Act of 2010, is subject to the provisions of the Act and any federal regulations promulgated pursuant to the provisions of the Act applicable to coverage for mental health and substance use disorder benefits.

§21.2402. Definitions.

The following words and terms, when used in this subchapter shall have the following meanings, unless the context clearly indicates otherwise.

(1) Aggregate lifetime limit--A dollar limitation on the total amount of specified benefits that may be paid under a health plan issuer's [~~carrier's~~] coverage for an individual (or for a group of individuals considered a single coverage unit in applying this dollar limitation, such as a family or an employee plus spouse).

(2) Annual limit--A dollar limitation on the total amount of specified benefits that may be paid in a 12-month period under a health plan issuer's [~~carrier's~~] coverage for an individual (or for a group of individuals considered a single coverage unit in applying this dollar limitation, such as a family or an employee plus spouse).

(3) Base period--The period used to calculate whether a group health plan may claim, with respect to its coverage, the [~~one percent~~] increased cost exemption provided for in §21.2405 of this subchapter (relating to Cost of Coverage Exemption). The base period must begin on the first day in the group health plan's plan year that the health plan issuer's [~~carrier's~~] coverage complies with this subchapter [~~or September 26, 1996, the date of the enactment of the federal Mental Health Parity Act, Part 7 of Subtitle B of Title I of ERISA, 29 U.S.C. §1001, et seq.~~], and must extend for a period of at least six consecutive calendar months.

[(4) Carrier - An insurance company, a group hospital service corporation operating under Chapter 20 of the Texas Insurance Code, a fraternal benefit society operating under Chapter 10 of the Code, a stipulated premium insurance company operating under Chapter 22 of the Code, a health maintenance organization operating under the Texas Health Maintenance Organization Act (Chapter 20A, Texas Insurance Code), an approved nonprofit health corporation that is certified under Section 5.01(a), Medical Practice Act (Article 4495b, Texas Civil Statutes) and that holds a certificate of authority under Texas Insurance Code Article 21.52F, or a multiple employer welfare arrangement that holds a certificate of authority under Texas Insurance Code Article 3.95-2.]

(4) [(5)] Coverage--Group health insurance coverage, group health care coverage or group health benefit coverage issued by a health plan issuer [carrier] to a group health plan.

(5) Financial requirement--A requirement that includes deductibles, copayments, coinsurance, and out-of-pocket expenses, but excludes an aggregate lifetime limit and an annual limit in accordance with the definitions and applications of those limits in this subchapter.

(6) Group health plan--An employee welfare benefit plan, as defined in 29 U.S.C. 1002(1), that provides medical care to participants or their dependents through the purchase of coverage from a health plan issuer [carrier].

(7) Health plan issuer--Any entity authorized under the Insurance Code or another insurance law of this state that provides health insurance or health benefits in this state, including an insurance company, a group hospital service corporation operating under the Insurance Code Chapter 842, a fraternal benefit society operating under the Insurance Code Chapter 885, a stipulated premium insurance company operating under the Insurance Code Chapter 884, a health maintenance organization operating under the Texas Health Maintenance Organization Act (Chapter 843), an approved nonprofit health corporation that is certified under the Occupations Code Chapter 151 (Medical Practice Act) and that holds a certificate of authority under the Insurance Code Chapter 844, or a multiple employer welfare arrangement that holds a certificate of authority under the Insurance Code Chapter 846.

(8) [(7)] Incurred expenditures--Actual claims incurred during the base period and reported within two months following the base period, and administrative costs for all benefits under the group health plan, including mental health or substance use disorder benefits and medical/surgical benefits, during the base period. Incurred expenditures do not include premiums.

(9) Large Employer--For purposes of this subchapter, an employer that, in connection with a group health plan with respect to a calendar year and a plan year, meets the definition of a large employer as defined in the Insurance Code §1501.002(8), except that the reference to "eligible employee" for purposes of this subchapter is a reference to "employee."

(10) [(8)] Medical care--Amounts paid for:

(A) the diagnosis, cure, mitigation, treatment or prevention of disease, or amounts paid for the purpose of affecting any structure or function of the body,

(B) transportation primarily for and essential to medical care described in subparagraph (A) of this paragraph, and

(C) coverage for medical care described in subparagraphs (A) and (B) of this paragraph.

(11) [(9)] Medical/surgical benefits--Benefits for medical or surgical services, as defined under the terms of the coverage, but does not include mental health or substance use disorder benefits.

(12) [(10)] Mental health benefits--Benefits with respect to services for mental health conditions [services], as defined under the terms of the coverage and in accordance with applicable federal and state law[, but does not include benefits for treatment of substance abuse or chemical dependency].

(13) Predominant--A financial requirement or treatment limitation as defined in this section is considered to be predominant if it is the most common or frequent of such type of limitation or requirement.

(14) Small Employer--For purposes of this subchapter, an employer that, in connection with a group health plan with respect to a calendar year and a plan year, meets the definition of a small employer as defined in the Insurance Code §1501.002(14), except that the reference to "eligible employee" for purposes of this subchapter is a reference to "employee."

(15) Substance use disorder benefits--Benefits with respect to services for substance use disorders, as defined under the terms of the plan and in accordance with applicable federal and state law. The term includes coverage for chemical dependency as set out in the Insurance Code Chapter 1368.

(16) Treatment limitation--A limitation that includes limits on the frequency of treatment, number of visits, days of coverage, or other similar limits on the scope or duration of treatment.

§21.2403. Large Employer Health Plan Parity Requirements.

(a) Coverage that provides both medical/surgical benefits and mental health or substance use disorder benefits must comply with paragraphs (1) - (8)[, (2), or (5)] of this subsection. For purposes of this section, a treatment limitation or financial requirement is considered to apply to substantially all medical/surgical benefits covered by the group health plan, or within a classification of benefits as addressed in paragraph (8) of this subsection, if it applies to at least two-thirds of all medical benefits covered by the group health plan, or within such classification of benefits.

(1) If a health plan issuer's [carrier's] coverage does not include an aggregate lifetime limit or an annual limit on any medical/surgical benefits or includes aggregate lifetime or annual limits that apply to less than one-third of all medical/surgical benefits, the health plan issuer [carrier] may not impose any aggregate lifetime or annual limit, respectively, on mental health or substance use disorder benefits.

(2) If a health plan issuer's [carrier's] coverage includes an aggregate lifetime limit or an annual limit on substantially [at least two-thirds of] all medical/surgical benefits, the health plan issuer [carrier] must either:

(A) apply the aggregate lifetime or annual limit both to the medical/surgical benefits to which the limit would otherwise apply and to mental health and substance use disorder benefits in a manner that does not distinguish between the medical/surgical and mental health and substance use disorder benefits; or

(B) not include an aggregate lifetime limit or an annual limit on mental health or substance use disorder benefits that is less than the aggregate lifetime or annual limit, respectively, on the medical/surgical benefits.

[(3) The provisions of paragraphs (1) and (2) are illustrated in the following examples:]

[(A) Prior to January 1, 1998, a carrier issuing coverage had no annual limit on medical/surgical benefits and a $10,000 annual limit on mental health benefits. To comply with the parity requirements of this subsection (a), a carrier is considering each of the following options. In this example, each of the three options being considered

would comply with the requirements of this subsection because each option offers parity in the dollar limits placed on medical/surgical and mental health benefits:]

[(i) eliminating the annual limit on mental health benefits;]

[(ii) replacing the annual limit on mental health benefits with a $500,000 annual limit on all benefits (including medical/surgical and mental health benefits); and]

[(iii) replacing the previous annual limit on mental health benefits with a $250,000 annual limit on medical/surgical benefits and a $250,000 annual limit on mental health benefits.]

[(B) Prior to January 1, 1998, a carrier issued coverage with a $100,000 annual limit on medical/surgical inpatient benefits, a $50,000 annual limit on medical/surgical outpatient benefits, and a $100,000 annual limit on all mental health benefits. To comply with the parity requirements of this subsection (a), the carrier is considering each of the following options. In this example, both options under consideration would comply with the requirements of this section because each offers parity in the dollar limits placed on medical/surgical and mental health benefits:]

[(i) replacing the previous annual limit on mental health benefits with a $150,000 annual limit on mental health benefits; and]

[(ii) replacing the previous annual limit on mental health benefits with a $100,000 annual limit on mental health in-patient benefits and a $50,000 annual limit on mental health outpatient benefits.]

[(C) A carrier has issued coverage that is subject to the requirements of this section which has no aggregate lifetime or annual limit for either medical/surgical benefits or mental health benefits. While the coverage provides medical/surgical benefits with respect to both network and out-of-network providers it does not provide mental health benefits with respect to out-of-network providers. In this example, the coverage complies with the requirements of this subsection because it offers parity in the dollar limit placed on medical/surgical and mental health benefits.]

[(D) Notwithstanding Insurance Code Article 3.51-9 the following example is provided for illustration only and does not relieve a carrier from compliance with that article. Prior to January 1, 1998, a carrier issued coverage with an annual limit on medical/surgical benefits and a separate but identical annual limit on mental health benefits. The coverage included benefits for treatment of chemical dependency and substance abuse in its definition of mental health benefits. Accordingly, claims paid for treatment of substance abuse and chemical dependency were counted in applying the annual limit on mental health benefits. To comply with the parity requirements of this subsection (a), the carrier is considering each of the following options. In this example, the option in clause (i) would not comply with the requirements of this section because the definition of mental health benefits excludes benefits for treatment of substance abuse and chemical dependency. However, options set forth in clauses (ii) (iii) and (iv) would comply with the requirements of subsection (a) because they offer parity in the dollar limits placed on medical/surgical and mental health benefits:]

[(i) making no change in the coverage so that claims paid for treatment of substance abuse and chemical dependency continue to count in applying the annual limit on mental health benefits;]

[(ii) amending the coverage to count claims paid for the treatment of substance abuse and chemical dependency in applying the annual limit on medical/surgical benefits as opposed to counting those claims in applying the annual limit on mental health benefits;]

[(iii) amending the coverage to provide a new category of benefits for treatment of substance abuse and chemical dependency that is subject to a separate, lower limit and under which claims paid for treatment of substance abuse and chemical dependency are counted only in applying the annual limit on this separate category; and]

[(iv) amending the coverage to eliminate distinctions between medical/surgical benefits and mental health benefits and establishing an overall limit on coverage offered under which claims paid for treatment of substance abuse and chemical dependency are counted with medical/surgical benefits and mental health benefits in applying the overall limit.]

(3) [(4)] For purposes of this section, the determination of whether the portion of medical/surgical benefits subject to a limit represents at least one-third of or substantially [two-thirds of] all medical/surgical benefits is based on the dollar amount of all payments by the health plan issuer [carrier] for medical/surgical benefits expected to be paid under a given group health plan for the plan year (or for the portion of the plan year after a change in coverage that affects the applicability of the aggregate lifetime or annual limits). Any reasonable method may be used to determine whether the dollar amounts expected to be paid under the coverage will constitute at least one-third of or substantially all [two-thirds] of the dollar amount of all payments for medical/surgical benefits.

(4) [(5)] Coverage that is not described in paragraphs (1) or (2) of this subsection [(a) of this section] must either impose:

(A) no aggregate lifetime or annual limit, as appropriate, on mental health or substance use disorder benefits; or

(B) an aggregate lifetime limit or an annual limit on mental health or substance use disorder benefits that is no less than an average limit for medical/surgical benefits calculated in the following manner:

(i) The average limit is calculated by taking into account the weighted average of the aggregate lifetime or annual limits, as appropriate, that are applicable to the categories of medical/surgical benefits.

(ii) Limits based on delivery systems, such as inpatient/outpatient treatment, or normal treatment of common, low-cost conditions (such as treatment of normal births), do not constitute categories for purposes of clause (i) of this subparagraph [(B) of paragraph (5) of this section].

(iii) For purposes of determining weighted averages, any benefits that are not within a category that is subject to a separately-designated limit under the coverage are taken into account as a single separate category by using an estimate of the upper limit on the dollar amount that a health plan issuer [carrier] may reasonably be expected to incur with respect to such benefits for a given group health plan, taking into account any other applicable restrictions under the coverage.

(C) For purposes of this paragraph [(5)], the weighting applicable to any category of medical/surgical benefits is determined in the manner set forth in paragraph (3) of this subsection for determining substantially [one-third or two-thirds of] all medical/surgical benefits.

[(D) The provisions of paragraph (5) are illustrated by the following example:]

[(i) A carrier issued coverage that is subject to the requirements of this section which includes a $100,000 annual limit

on medical/surgical benefits related to cardio-pulmonary diseases. The coverage does not include an annual limit on any other category or medical/surgical benefits. It is determined that 40% of the dollar amount of coverage for medical/surgical benefits is related to cardio-pulmonary diseases. It is also determined that $1,000,000 is a reasonable estimate of the upper limit on the dollar amount that may be incurred with respect to the other 60% of payments for medical/surgical benefits.]

[(ii) In this example, the coverage issued is not described in subsection (a)(2) of this section because there is not one annual limit that applies to at least two-thirds of all medical/surgical benefits. Further, the coverage is not described in subsection (a)(1) of this section because more than one-third of all medical/surgical benefits are subject to an annual limit. Under this subsection (a)(5) the carrier may choose either to include no annual limit on mental health benefits, or to include an annual limit on mental health benefits that is not less than the weighted average of the annual limits applicable to each category of medical/surgical benefits. In this example, the minimum weighted average annual limit that can be applied to mental health benefits is $640,000 (40% x $100,000 + 60% x $1,000,000 = $640,000).]

(5) Financial requirements as defined in this subchapter must be no more restrictive for mental health or substance use disorder benefits than the predominant financial requirements as defined in this subchapter applied to substantially all medical and surgical benefits covered by the group health plan.

(6) Treatment limitations as defined in this subchapter must be no more restrictive for mental health or substance use disorder benefits than the predominant treatment limitations as defined in this subchapter applied to substantially all medical and surgical benefits covered by the group health plan.

(7) Separate cost-sharing requirements or separate treatment limitations that are applicable only with respect to mental health or substance use disorder benefits are prohibited.

(8) For purposes of this subsection, whether a financial requirement or treatment limitation is a predominant financial requirement or treatment limitation that applies to substantially all medical/surgical benefits in a classification is determined separately for each type of financial requirement or treatment limitation. The classifications set forth in subparagraphs (A) - (F) of this paragraph are the classifications to be utilized in applying the provisions of this subsection. The classifications are as follows:

(A) benefits furnished on an inpatient basis and within a network of providers established or recognized under a plan or health insurance coverage;

(B) benefits furnished on an inpatient basis and outside any network of providers established or recognized under a plan or health insurance coverage, including inpatient benefits under a plan or health insurance coverage that has no network of providers;

(C) benefits furnished on an outpatient basis and within a network of providers established or recognized under a plan or health insurance coverage;

(D) benefits furnished on an outpatient basis and outside any network of providers established or recognized under a plan or health insurance coverage, including outpatient benefits under a plan or health insurance coverage that has no network of providers;

(E) benefits for emergency care; and

(F) benefits for prescription drugs.

(b) This subchapter does not:

(1) require a health plan issuer [carrier] to provide any mental health or substance use disorder benefits, except as otherwise specified in the [Texas] Insurance Code; or

(2) affect the terms and conditions (including, as allowed by law, cost sharing, limits on numbers of visits or days of coverage, and requirements relating to medical necessity, requiring prior authorization for treatment, or requiring primary care physicians' referrals for treatment) relating to the amount, duration, or scope of the mental health or substance use disorder benefits under the health plan issuer's [carrier's] coverage, except as specifically provided in this section.

(c) If a large employer group health plan provides both medical and surgical benefits and mental health or substance use disorder benefits, utilization review for mental health or substance use disorder benefits shall be conducted in accordance with provisions of the Insurance Code Chapter 4201.

(d) If a large employer group health plan provides both medical and surgical benefits and mental health or substance use disorder benefits and the plan provides coverage for medical and surgical benefits provided by out-of-network providers, the plan also shall provide coverage for mental health or substance use disorder benefits provided by and services performed by out-of-network providers.

(e) Notwithstanding subsection (a) of this section, pursuant to the Insurance Code Chapter 1355 and in accordance with subsection (b)(1) of this section, a large employer group health plan must provide coverage for treatment of serious mental illness, based on medical necessity, for no fewer than 45 days of inpatient treatment and no fewer than 60 visits for outpatient treatment.

(1) Pursuant to the Insurance Code §1355.004(a)(2), a large employer group health plan may not include a lifetime limitation on the number of days of inpatient treatment or the number of visits for outpatient treatment for serious mental illness covered under the plan.

(2) Pursuant to the Insurance Code §1355.004(b)(1), a large employer group health plan may not count an outpatient serious mental illness visit for medication management against the number of outpatient visits required to be covered.

(f) Pursuant to the Insurance Code Chapter 1368 and in accordance with subsection (b)(1) of this section, a large employer group health plan must provide coverage for the necessary care and treatment of chemical dependency in accordance with minimum standard requirements set forth in §§1368.004 - 1368.006(a) and §1368.007, and Chapter 3, Subchapter HH of this title (relating to Standards for Reasonable Cost Control and Utilization Review for Chemical Dependency Treatment Centers).

§21.2404. Small Employer Health Plan Parity Requirements [Exemptions].

(a) This subchapter does not apply to a health plan issuer [carrier] offering coverage in connection with a group health plan for a plan year of a small employer as defined in this subchapter. [For purposes of this subchapter, a small employer in connection with a group health plan with respect to a calendar year and a plan year, is an employer who employed an average of at least two but not more than fifty employees on business days during the preceding calendar year and who employs at least two employees on the first day of the plan year.]

(1) In determining employer size, all persons treated as a single employer under subsections (b), (c), (m), and (o) of §414 of the federal [Federal] Internal Revenue Code are treated as one employer.

(2) For an employer who was not in existence throughout the preceding calendar year, the determination as to whether the employer is a small employer is based on the average number of employ-

ees the employer reasonably expects to employ on business days during the current calendar year.

(3) A reference to an employer for purposes of the exemption set forth in this subsection includes a reference to the predecessor of the employer.

(b) Notwithstanding subsection (a) of this section, pursuant to the Insurance Code §1355.007, an issuer of a group health plan to a small employer must offer coverage for serious mental illness as described in §1355.004. The employer may reject the coverage, but if the employer accepts the coverage, such coverage must meet the requirements of §1355.004.

(c) Notwithstanding subsection (a) of this section, pursuant to the Insurance Code Chapter 1368, an issuer of a group health plan to a small employer must provide coverage for substance use disorder that meets the minimum coverage requirements of Chapter 1368 and Chapter 3, Subchapter HH of this title (relating to Standards for Reasonable Cost Control and Utilization Review for Chemical Dependency Treatment Centers).

[(b) Coverage is not subject to the requirements of this subchapter if the application of §21.2403 of this title (relating to Parity Requirements) to such coverage results in an increase in the cost for such coverage of at least one percent, as determined by §21.2405 of this title (relating to Cost of Coverage Exemption).]

§21.2405. Cost of Coverage Exemption.

(a) Coverage is not subject to the requirements of this subchapter if the application of §21.2403 of this subchapter (relating to Large Employer Parity Requirements) to such coverage results in an increase in the cost for such coverage as determined by and in accordance with the provisions of this section.

(b) [(a)] To qualify for an exemption from this subchapter on the basis that the application of this subchapter increases the cost of coverage by a qualifying amount [at least one percent], at the request of a group health plan, a health plan issuer [carrier] must demonstrate with actual data that the application of this subchapter resulted in an increase of cost of the health plan issuer's [carrier's] coverage in connection with that group health plan of at least:

(1) two percent in the first plan year in which it is applied; and

(2) one percent in subsequent plan years [or more].

(c) The determination and data relied upon by a health plan issuer [carrier] demonstrating such an increase must be:

(1) based upon a base period of no fewer [shorter] than six months; and[.]

(2) determined only after such coverage has complied with the provisions of this subchapter for the first six months of the plan year for which the determination is made.

(d) [(b)] The calculation of the cost of coverage and determination of increases to actual costs under a plan for which exemption is sought shall be made and certified by a qualified and licensed actuary who is a member in good standing of the American Academy of Actuaries. All such determinations shall be in a written report prepared by the actuary. The report, and all underlying documentation relied upon by the actuary, shall be maintained by the health plan issuer for a period of six years following the notification made under subsection (e) of this section. [by the following formula:]
[Figure: 28 TAC §21.2405(b)]

[(1) IE - the incurred expenditures during the base period.]

[(2) CE - the claims incurred during the base period that would have been denied under the terms of the carrier's coverage absent amendments to coverage required to comply with this subchapter or the federal Mental Health Parity Act.]

[(3) AE - administrative costs related to claims in CE and other administrative costs attributable to complying with the requirements of this subchapter or the federal Mental Health Parity Act.]

(e) A health plan issuer offering coverage in connection with a group health plan that, based on certification under subsection (d) of this section, qualifies for an exemption and elects to implement the exemption, shall promptly notify the department, the Secretary of Health and Human Services, and the beneficiaries in the plan of such election. Notification to the Secretary must comply with the requirements of the federal Mental Health Parity and Addiction Equity Act of 2008.

[(c) The provisions of these subsections (a) and (b) are illustrated by the following example: A carrier issued coverage to a group health plan has a plan year that is the calendar year. The coverage issued satisfies the requirements of §21.2403 of this title (relating to Parity Requirements) as of January 1, 1998. On September 15, 1998, it is determined that $1,000,000 in administrative costs have been incurred during the period between January 1, 1998 and June 30, 1998 and reported by August 30, 1998. It is also determined that $100,000 in administrative costs have been incurred for all benefits under the coverage issued to the group health plan, including mental health benefits. Thus, it is determined that the incurred expenditures for the base period are $1,100,000. It is also determined that the claims incurred during the base period that would have been denied under the terms of the plan absent any amendments required to comply with these subsections are $40,000 and that administrative expenses attributable to complying with the requirements of this subsection (b) are $10,000. Thus, the total amount of expenditures for the base period had the coverage not been amended to comply with the requirements of §21.2403 of this title (relating to Parity Requirements) are $1,050,000 ($1,100,000-($40,000 + $10,000) = $1,050,000). In this example, the coverage issued to the group health plan satisfies the requirements of subsection (a) of this section because the application of this section results in an increased cost of at least one percent under the terms of the coverage ($1,100,000/$1,050,000 = 1.04762).]

(f) [(d)] A health plan issuer [carrier] may contract with a group health plan to provide to the plan's participants and beneficiaries, and to applicable federal agencies, any notice of exemption required by applicable federal regulations.

(g) [(e)] A health plan issuer [carrier] may contract with a group health plan to provide to the plan's participants and beneficiaries (or their representatives), on request and at no charge to the recipient, a summary of the information on which the exemption was based. If a health plan issuer [carrier] so contracts with a group health plan:

(1) An individual who is not a participant or beneficiary and who presents the health plan issuer [carrier] a notice described in subsection (e) [(c)] of this section is considered to be a representative. A representative may request the summary of information by providing the plan a copy of the notice provided to the participant under subsection (e) [(c)] of this section with any individually identifiable information redacted.

(2) The summary of information must include the incurred expenditures, the base period, the dollar amount of claims incurred during the base period that would have been denied under the terms of the plan absent amendments required to comply with subsection (a) of §21.2403 of this subchapter [title] (relating to Large Employer Parity Requirements), the administrative costs related to those claims, and other administrative costs attributable to complying with the require-

ments for the exemption. In no event should the summary of information include any individually identifiable information.

(h) An employer may elect to continue to apply mental health and substance use disorder parity pursuant to this subchapter with respect to the health plan for which the determination is made regardless of any increase in total costs.

[(f) The provisions of these subsections (d) and (e) are illustrated by the following example:]

[(1) A carrier issued a group health plan that has a plan year that is the calendar year and has an open enrollment period every November 1 through November 30. It is determined on September 15 that the coverage satisfies the requirements of subsection (a) of this section. The group health plan enters into a contract with a carrier which provides that as part of the plan's open enrollment materials and pursuant to the notice requirement of any federal notice requirements, the carrier mails, on October 15, to all participants and beneficiaries a notice satisfying the requirements of all federal notice requirements as set forth in subsection (c) of the section.]

[(2) In this example, the notice requirements have been met as required by subsections (d) and (e) of this section.]

§21.2406. Separate Application to Each Benefit Package Offered.

If a health plan issuer [carrier] provides coverage to a group health plan that offers two or more coverages to participants or their dependents, the requirements of this subchapter, including the exemptions, shall be applied separately to each coverage. An example of a group health plan that provides two or more coverages is a group health plan that offers both indemnity coverage and HMO coverage.

§21.2407. Sale of Nonparity Policies or Coverage.

A health plan issuer [carrier] may not sell coverage without parity, as described in §21.2403 of this subchapter [title] (relating to Large Employer Parity Requirements) to a group health plan unless [only if]:

(1) the coverage meets the requirements of §21.2404 of this subchapter [title] (relating to Small Employer Parity Requirements [Exemptions]); or

(2) the group health plan meets the criteria set out in §21.2405 [has already met the requirements of §21.2404] of this subchapter (relating to Cost of Coverage Exemption) [title].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 18, 2010.

TRD-201006597
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: January 2, 2011
For further information, please call: (512) 463-6327

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CHAPTER 31. LIQUIDATION
SUBCHAPTER B. AUDIT COVERAGES REQUIRED FOR THE RECEIVER AND SPECIAL DEPUTY RECEIVERS

28 TAC §§31.101 - 31.107

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Insurance or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Department of Insurance (Department) proposes the repeal of Subchapter B, §§31.101 - 31.107, concerning Audit Coverages Required for the Receiver and Special Deputy Receivers. These rules were adopted under the authority of the Insurance Code Article 21.28; this proposed repeal is necessary to implement legislative changes as a result of the enactment of revisions to the Insurance Code. The Insurance Code Article 21.28 §12(j) required the State Board of Insurance to adopt rules prescribing the audit coverage required for the receiver, special deputy receivers, and guaranty associations under specified provisions of the Insurance Code. Article 21.28 §12(j) required such rules to include provisions relating to scope, frequency, reporting requirements and costs of audits. Article 21.28 was repealed in the nonsubstantive Insurance Code revision, Acts 2005, 79th Legislature, Chapter 995, §9, effective September 1, 2005. Article 21.28 §12(j) was re-adopted as §442.451 in the nonsubstantive Insurance Code revision, Acts 2005, 79th Legislature, Chapter 727, §1, effective April 1, 2007, but §442.451 was later repealed by Acts 2007, 80th Legislature, Chapter 730, §3B.003, effective September 1, 2007.

House Bill (HB) 2157, enacted by the 79th Legislature, Regular Session, effective September 1, 2005, effectuated the Insurance Code §21A.355 which provides for an external audit of a receiver's books, which is similar to former Insurance Code Article 21.28 §12(g). Section 21A.355 was redesignated as §443.355 in the nonsubstantive Insurance Code revision, Acts 2007, 80th Legislature, Chapter 730, §3B.004(a)(1)(H), effective September 1, 2007. The Insurance Code §443.355 provides that the receivership court may, as it deems desirable, order audits to be made of the books of the receiver and a report of each audit shall be filed with the Commissioner of Insurance (Commissioner) and with the receivership court.

Under HB 2157, the authority to appoint a special deputy was retained under the Insurance Code Chapter 21A. Chapter 21A was redesignated as Chapter 443 in the nonsubstantive Insurance Code revision, Acts 2007, 80th Legislature, Chapters 730, §3B.004(a)(1), effective September 1, 2007. The Insurance Code §443.102(a) and §443.154(a) provides that the Commissioner, in his capacity as rehabilitator or liquidator, may appoint a special deputy to act on his behalf, and the special deputy serves at his pleasure. In accordance with the Insurance Code §443.102(e) and §443.154(x), the enumeration of the powers and authority of the Commissioner as rehabilitator or liquidator in these sections may not be construed as a limitation upon the rehabilitator or liquidator, nor may it exclude in any manner the right to do other acts not specifically enumerated or otherwise provided for, to the extent necessary or appropriate.

Pursuant to the Insurance Code Chapter 443, the Commissioner, as rehabilitator or liquidator, has the inherent authority to audit a special deputy receiver acting on his behalf. Sections 31.101 - 31.107 are not needed to administer audits of special deputy receivers, and contain conditions that can restrict the ability of the rehabilitator or liquidator to conduct effective audits. Therefore, these rules should be repealed.

FISCAL NOTE. Angel Garrett, Director of Rehabilitation and Liquidation Oversight, has determined that for each year of the first five years the proposed repeal will be in effect, there will be no fiscal impact to state and local governments as a result of the

enforcement or administration of the rule. There will be no measurable effect on local employment or the local economy as a result of the proposal.

PUBLIC BENEFIT/COST NOTE. Ms. Garrett also has determined that for each year of the first five years the proposed repeal is in effect, the public benefits anticipated as a result of the proposal will be that the rehabilitator or liquidator will have increased flexibility to conduct more effective audits. There are no anticipated economic costs to persons who are required to comply with the proposed repeal. There will be no effect on small or micro businesses.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESS. The Government Code §2006.002(c) requires that if a proposed rule may have an economic impact on small businesses, state agencies must prepare as part of the rulemaking process an economic impact statement that assesses the potential impact of the proposed rule on small businesses and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule. There will be no new costs to any person to comply with the repeal. There is no anticipated adverse economic effect on small or micro businesses regarding the regulatory cost of compliance with the repeal; therefore, preparation of an economic impact statement and regulatory flexibility analysis is not statutorily required.

TAKINGS IMPACT STATEMENT. The Department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on January 3, 2011, to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comment must be simultaneously submitted to Angel Garrett, Director of Rehabilitation and Liquidation Oversight, Mail Code 305-1C, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Any request for a public hearing should be submitted separately to the Office of the Chief Clerk before the close of the public comment period. If a hearing is held, written and oral comments presented at the hearing will be considered.

STATUTORY AUTHORITY. The repeal of these sections is proposed pursuant to the Insurance Code §36.001, which authorizes the Commissioner of Insurance to adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE. No statute is affected by this proposal.

§31.101. Purpose.

§31.102. Applicability.

§31.103. Nature of Audits.

§31.104. Scope and Frequency of Audits.

§31.105. Audit Reporting Requirements.

§31.106. Cost of Audits.

§31.107. Severability.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 19, 2010.

TRD-201006628
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: January 2, 2011
For further information, please call: (512) 463-6327

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PART 2. TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION

CHAPTER 133. GENERAL MEDICAL PROVISIONS

The Texas Department of Insurance (Department), Division of Workers' Compensation (Division) proposes amendments to §§133.10, 133.500, and 133.501 concerning billing forms and formats, electronic formats for electronic medical bill processing, and processing of electronic medical bills, and new §133.502 concerning supplemental data requirements for electronic medical bills submitted before January 1, 2012. The amendments and new rule are necessary to ensure that workers' compensation medical billing requirements remain aligned, to the extent possible, with the billing requirements and standards adopted by the Centers for Medicare and Medicaid Services (CMS) as required by statutory provisions of Labor Code §413.011.

House Bill (HB) 7, enacted by the 79th Legislature, Regular Session, effective September 1, 2005, amended the Labor Code by the addition of new §408.0251, which requires the Commissioner of Workers' Compensation (Commissioner) to adopt rules regarding the electronic submission and processing of medical bills by health care providers to insurance carriers and which requires insurance carriers to accept medical bills submitted electronically by health care providers in accordance with the adopted rules. HB 7 also amended §413.011 to require the Commissioner to adopt the most current reimbursement methodologies, models, and values or weights used by CMS to achieve standardization, including applicable payment policies relating to coding, billing, and reporting and with modifications to documentation requirements as needed for workers' compensation purposes.

As part of the development process for these proposed rules, the Division posted informal working drafts of the sections on its website on September 15, 2008 and August 15, 2009 and received 9 written informal comments and 23 written informal comments, respectively, from multiple system participants. These proposed rules incorporate several recommendations offered by those system participants. The Division also solicited public input through five stakeholder meetings held on April 7, 2008, August 25, 2008, December 17, 2008, April 13, 2010, and May

10, 2010. Additionally, as part of the rule development process, the Division examined the electronic medical bill implementation rules for various jurisdictions and evaluated the strengths and deficiencies of those rules to determine if the approaches used would be beneficial to the proposed rules.

Other amendments are proposed throughout the rule text to correct typographical, grammatical, and punctuation errors in the current rule text, make changes to conform rule text to current drafting style, and simplify and clarify provisions in Chapter 133.

DESCRIPTION OF THE PROPOSED AMENDMENTS AND NEW RULE

Proposed amendment of §133.10: The proposed amendment to §133.10(a) clarifies that health care providers are required to submit medical bills using the electronic formats adopted in proposed §133.500 and §133.501 of this title unless either the health care provider or the billed insurance carrier is exempt from billing electronically under proposed §133.501 of this title. The proposed amendment to §133.10(a) further clarifies that health care providers covered by subsection (a) includes those providing services for certified workers' compensation health care networks as defined in Insurance Code Chapter 1305 or to political subdivisions with contractual relationships under Labor Code §504.053(b)(2).

Proposed §133.10(b) requires health care providers that are exempt, as provided under proposed §133.10(a), to submit paper bills using standard forms prescribed by the Division. The Division requires the same standard forms for professional and institutional services used by CMS for Medicare services and the same standard form for dental services used by the Texas Medicaid and Healthcare Partnership (TMHP). The proposed amendment to §133.10(b) also clarifies that health care providers covered by subsection (b) includes those providing services for certified workers' compensation health care networks as defined in Insurance Code Chapter 1305 or to political subdivisions with contractual relationships under Labor Code §504.053(b)(2).

The proposed §133.10(c) requires pharmacists and pharmacy processing agents billing for pharmacy services to bill using Division form DWC-66 for billing, but allows use of an alternative billing form if the insurance carrier approves its use prior to submission and the alternative billing form contains all of the information in the Division form DWC-66.

The proposed §133.10(d) requires dentists to bill for dental services on the current American Dental Association (ADA) claim form. The ADA 2006 Dental Claim Form is also used by the TMHP for Medicaid dental services.

Proposed §133.10(e) requires surgical implant providers to bill using a form prescribed by proposed §133.10(e)(1) if reimbursement is sought under §134.402 of this title (relating to Ambulatory Surgical Center Fee Guideline) or a form prescribed by proposed §133.10(e)(2) if the reimbursement is sought under either §134.403 or §133.404 of this title (relating to Hospital Facility Fee Guideline--Outpatient and Hospital Fee Guideline--Inpatient, respectively). These requirements have been included in proposed §133.10(e) at the request of stakeholders, in order to ensure the appropriate forms are used based on the facility at which the service was rendered.

Proposed §133.10(f) requires billing information submitted on paper forms be legible and conform to the instructions set forth in this section. It clarifies that the parenthetical information related to various terms applies to the corresponding field number on the applicable paper medical billing form. The data element requirement format used within this proposed subsection regarding the completion of the paper medical bills aligns with the format used by the Department concerning clean claim requirements for health care as contained in §21.2803 of this title (related to Elements of a Clean Claim).

Proposed §133.10(f)(1) requires that medical bills filed or resubmitted for professional and noninstitutional services be filed using the CMS-1500 form and must include the data elements in this subsection.

Proposed §133.10(f)(2) requires that medical bills filed or resubmitted for institutional services be filed using the UB-04 form and must include the data elements in this subsection.

Proposed §133.10(f)(3) requires that medical bills filed or resubmitted for drugs or other pharmacy services must be filed on the Division's DWC-66 form or other form permitted under subsection (c), and must include the data elements in this subsection. It is noted that the substantive changes to the draft DWC-66 referenced in this proposed subsection include the requirement to include the National Provider Identification number (NPI number) and the preauthorization number, when applicable. The addition of the NPI number is consistent with billing instructions used in the health care industry for services on and after May 23, 2008. The addition of the preauthorization number is intended to expedite payment processing for drugs that are not contained in the Division's closed formulary and to align the billing instructions with those provisions.

Proposed §133.10(f)(4) requires that medical bills filed or resubmitted for dental services be filed on the ADA 2006 Dental Claim Form and must include the data elements in this subsection.

Proposed §133.10(g) requires a default value of "999999999" to be used by a health care provider where an injured employee does not have a Social Security Number as required in subsection (f).

Proposed §133.10(h) provides the required format for state license numbers, other than facility state license numbers, submitted under subsection (f).

Proposed §133.10(i) provides the designators to be used in reporting the state license numbers as required by subsection (h) and the format for submissions where the health care provider has no state license number.

Proposed §133.10(j) provides definitions for resubmission condition codes reported under subsection (f).

Proposed §133.10(k) provides that where a resubmitted medical bill complies with the requirements of §133.250 of this title (relating to Reconsideration of Payment of Medical Bills), the inclusion of the appropriate resubmission condition code and the original reference number is sufficient to identify the resubmission as a request for reconsideration.

Proposed amendment of §133.500: Proposed amendments to §133.500(a) adopt by reference the electronic medical bill processing standards adopted by the United States Department of Health and Human Services (HHS) in 45 CFR §162.1102(b) and §162.1602(b), for transactions occurring before January 1, 2012. Subsection (a)(1) contains the standards for professional billing, subsection (a)(2) contains the standards for institutional/hospital billing, subsection (a)(3) contains the standards for dental billing, subsection (a)(4) contains the standards for retail phar-

macy billing, and subsection (a)(5) contains the standards for remittance advice.

Proposed amendments to §133.500(b) apply to medical bill processing transactions submitted before January 1, 2012. Subsection (b)(1) contains the standards for acknowledgments and responses to submitted electronic medical and pharmacy medical bills. Subsection (b)(2) contains the standards for documentation submitted with an electronic medical bill for professional, institutional/hospital, dental, and retail pharmacy services.

Proposed amendments to §133.500(c) adopt by reference the electronic medical bill processing standards adopted by HHS in 45 CFR §162.1102(c) and §162.1602(c), for transactions occurring on or after January 1, 2012. Subsection (c)(1) contains the standards for professional billing, subsection (c)(2) contains the billing standards for institutional/hospital billing, subsection (c)(3) contains the billing standards for dental billing, subsection (c)(4) contains the billing standards for retail pharmacy billing, and subsection (c)(5) contains the standards for remittance advice.

Proposed amendments to §133.500(d) apply to medical bill processing transactions submitted on and after January 1, 2012. Subsection (d)(1) contains the standards for acknowledgments or responses to submitted electronic medical and pharmacy medical bills. Subsection (d)(2) contains the standards for documentation submitted with an electronic medical bill for professional, institutional/hospital, dental, and retail pharmacy services.

The proposed §133.500(e) requires an electronic medical bill transaction contain all the required fields set out in the standards adopted under proposed §133.500(a) or proposed §133.500(c) plus the supplemental data requirements in proposed §133.502 of this title (relating to Electronic Medical Billing Supplemental Data Requirements). Subsection (e) also requires that the submitted values be current and valid.

The proposed §133.500(f) allows insurance carriers and health care providers to exchange electronic data in non-standard formats provided that there is mutual agreement between the two parties and all the data elements in the Division's prescribed format are present in the non-standard format.

The proposed §133.500(g) and §133.500(h) provide directions on how to obtain copies of the adopted standards. The proposed §133.500(i) provides directions on how to review the adopted standards at the Division's office. These provisions are included in the rule consistent with the requirements contained in 1 Texas Administrative Code §91.40 (relating to How to File Adoption by Reference (ABR) Material).

Proposed amendment of §133.501: Proposed §133.501(a)(1) clarifies that the section applies to the exchange of electronic medical bill data under §133.500 for professional, institutional/hospital, pharmacy and dental services, including transactions for medical services rendered to certified workers' compensation health care networks as defined in Insurance Code Chapter 1305 or rendered to political subdivisions with contractual relationships under Labor Code §504.053(b)(2). Proposed §133.501(a)(2) clarifies that insurance carriers are required to accept electronic medical bills submitted by health care providers under §133.500, unless the insurance carrier is exempt under proposed subsection (b) of this section. Proposed §133.501(a)(3) clarifies that the health care provider is required to submit its electronic medical bills to the insurance carrier under §133.500 unless either the health care provider or the insurance carrier is exempt under proposed subsection (b) of this section.

Proposed §133.501(b)(1) provides the exemptions available to health care providers for the submission of electronic medical bills to the insurance carriers. Labor Code §413.011 requires that the Commissioner to adopt rules that align with the coding and billing policies used by the CMS. The Administrative Simplification Compliance Act (ASCA, Section 3 of Pub. L. 107-105, 42 CFR 424.32) requires that all initial claims for reimbursement under Medicare, except from small providers, be submitted electronically as of October 16, 2003. These provisions provide an exemption for "(a) physician, practitioner, facility, or supplier with fewer than 10 full-time equivalent employees." Based on these statutory and regulatory provisions, the proposed subsection adopts this same threshold for workers' compensation electronic medical bill submission. The proposed subsection also adds a new exemption related to the number of injured employees receiving services by the health care provider. In June 2010, the Workers' Compensation Research and Evaluation Group, Texas Department of Insurance published a research report entitled *Access to Medical Care in the Texas Workers' Compensation System, 1998 - 2008.* This report found, in pertinent part, that the top 20% of physicians were responsible for more than 80% of the market's key activities and treated between 32 and 41 patients per year. Accordingly, physicians who treat less than this number of patients are individually responsible for a relatively small percentage of the medical bills submitted each year. This additional metric provides an objective basis for health care providers that do not provide services to many injured employees, but do not meet the other exemption requirements. This exemption is designed to mitigate some of the connectivity challenges that exist for certain micro-businesses that have more than ten employees, but whose existing processes, practice management systems, and clearinghouses have limited connectivity to workers' compensation payers.

Proposed §133.501(b)(2) provides that health care providers that claim an exemption to electronic medical bill submission must provide supporting documentation to the Division within 15 days of a request for that information. This subsection enables the Division to take prompt action in the event a complaint is received and enables prompt resolution of the issue.

Proposed §133.501(b)(3) provides the exemptions available to insurance carriers for the reception of electronic medical bills submitted by the health care providers. The proposed subsection includes several new exemptions based on the reasons given by insurance carriers requesting exemptions over the last couple of years. These exemptions are based on objective criteria that can be easily determined by the requesting insurance carrier and will assist in streamlining the review process.

Proposed §133.501(b)(4) requires insurance carriers to notify the Division prior to the beginning of each calendar year if the insurance carrier will assert an exemption from the requirement to accept electronic medical records and details the information required in the notice. In practice, the Division has granted insurance carrier exemptions on an annual basis. However, the requirement to request the exemption on an annual basis is not contained in the existing rule. The addition of this requirement, along with basic contact information, will help ensure that insurance carriers understand the annual notification requirement and provide the Division with the information necessary to ask clarifying questions, if needed.

Proposed §133.501(c) provides that health care providers and insurance carriers may contract with other entities to handle the electronic medical billing process but that the health care providers and insurance carriers are responsible for any acts or omissions of their agents in performing those duties. This subsection contains similar information as the existing rule in §133.501(a)(4), but has been moved due to formatting changes.

Proposed §133.501(d)(1) defines an electronic medical bill as a medical bill submitted electronically by a health care provider or its agent. The definition of a "complete" electronic medical bill has been deleted to avoid any potential conflicts with other definitions contained in this title. The term "complete medical bill" is defined in §133.2 of this title (relating to Definitions) and applies to both electronic and paper medical bills.

Proposed §133.501(d)(2) provides that an insurance carrier must take final action on a complete electronic medical bill within 45 days after the date the complete electronic medical bill is received by the insurance carrier. The nature of electronic medical billing introduces complexities due to the number of health care information clearinghouses that may be involved in transmitting or exchanging electronic medical bills. This provision applies strictly to medical bill processing by the insurance carrier and ensures that the insurance carrier is afforded the time frame required by Labor Code §408.027(b), excluding potential delays between transmission intermediaries.

Proposed §133.501(e)(1) provides that an insurance carrier must acknowledge receipt of an electronic medical bill within two working days of receipt and that the timeframe for returning an incomplete medical bill set out in §133.200 of this title does not apply to electronic medical bills. Subparagraph (A) provides that when an electronic medical bill does not meet the definition of a complete medical bill or does not meet the edits defined in the applicable standards, the notice of rejection will be transmitted in an acknowledgement. Subparagraph (B) provides that a health care provider may not resubmit a duplicate electronic medical bill within 45 days from the date the insurance carrier acknowledges receipt of the original complete medical bill but may submit a corrected electronic medical bill after receiving notification of rejection. The corrected bill will be submitted as a new, original bill. The information contained in the existing rule regarding detailed and functional acknowledgments has been removed because the information can be conveyed and contained in four different acknowledgment processes: interchange, functional, implementation, or application level. The adopted standards explain the use and purpose of each of the transaction sets and additional specificity is not needed in the context of these rules. The processing timeframe has been expanded from one to two days based on stakeholder feedback, the complexities of connectivity, and other issues associated with electronic medical billing.

Proposed §133.501(e)(2) provides that acknowledgement is not an admission of liability by an insurance carrier and the insurance carrier may subsequently deny the accepted electronic medical bill for lack of coverage or liability issues. The revisions to this section are required due to the current statutory language and the industry use of the Application Advice (004010X161) transaction set, which is required by the existing rule and proposed §133.500(b)(1) for transactions conducted before January 1, 2012. Labor Code §408.027(b) specifically requires the insurance carrier to "pay, reduce, deny, or determine to audit the health care provider's claim not later than the 45th day after the date of receipt by the carrier of the provider's claim." This statutory provision does not condition the receipt of a medical bill based on the existence of liability issues. The Application Advice transaction set is designed to respond to an incoming health care claim transaction and is not intended to be used as an unsolicited response. Based on these issues, the previous language regarding rejections has been removed and replaced with language that aligns with both industry practices and the regulatory requirements regarding denying medical bills within the 45 days from receipt.

Proposed §133.501(f) provides that an electronic remittance notification is an explanation of benefits (EOB) concerning payment or denial of a medical bill, a recoupment request, or a receipt of refund. Insurance carriers must provide an electronic remittance notification no later than 45 days after receipt of a complete electronic medical bill or within five days of generating a payment. New language clarifies that the requirements in subsection (f) do not modify the medical bill processing timeframes in Labor Code §408.027.

Proposed §133.501(g) defines electronic documentation as consisting of medical documentation submitted electronically that is related to an electronic medical bill. The additional language contained in the existing subsection (e) has been removed to avoid conflicts with other regulatory provisions. For example, §133.501(d) already provides for mutually agreed upon formats and alternate mechanisms are allowed without restating those provisions. In addition, the required information necessary to match electronic documentation to an electronic medical bill is clearly explained in the adopted standards and is required to be included without listed a subset of the required information. With the implementation of electronic medical records and electronic file uploads, other mechanisms to ensure the transfer of complete medical documentation are already available and limiting the mechanism or data is not beneficial to efficient processing. Finally, Stakeholders have commented that this timeframe creates additional delays and problems associated with electronic medical bill processing. The removal of the seven day period is intended to improve the timeliness of medical bill matching processes.

Proposed new §133.502: Proposed new §133.502(a) sets out Texas-specific data elements required for all professional, institutional, and dental electronic medical bills submitted before January 1, 2012, that are in addition to the data requirements proposed to be adopted under §133.500(a) of this title. Proposed new §133.502(b) requires the injured employee Social Security Number and the health care provider state license numbers required in §133.502(a) to be submitted following the content and format requirements contained in proposed §133.10 of this title (related to Required Billing Forms/Formats). Proposed new §133.502(c) sets out Texas-specific data elements required for all professional, institutional, and dental electronic medical bills submitted on or after January 1, 2012, that are in addition to the data requirements proposed to be adopted under §133.500(b) of this title. Proposed new §133.502(d) sets out Texas-specific data elements required for all pharmacy electronic medical bills that are in addition to the standards proposed to be adopted under §133.500 of this title. The source documents related to these electronic transaction standards are published and maintained by Data Standard Maintenance Organizations, including the Accredited Standards Committee (ASC X12) and the National Council For Prescription Drug Programs (NCPDP). The historical approach used by the Division required stakeholders to review the ASC X12 or NCPDP standards, compare them with the contents of the rules, and perform another comparison

with the Division's instructions. By adopting the national standards and incorporating the data differences within the content of the rule, certain review inefficiencies are reduced and Division instruction errors are eliminated. The Division will review the ASC X12 or NCPDP standards on an ongoing basis and, if revisions to standards or rules are necessary, will initiate the rulemaking process in accordance with the Government Code, to inform stakeholders about any potential changes and provide them a public comment period. This approach improves stakeholder understanding of the current data requirements and improves the stability of the system by ensuring all potential changes are thoroughly reviewed prior to implementation. Lastly, it is noted that two lists of data requirements are contained in this rule due to the two different sets of electronic medical billing transaction versions that are proposed for adoption.

Mr. Matthew Zurek, Executive Deputy Commissioner of Health Care Management and Systems Monitoring, anticipates that for each year of the first five years the proposed new and amended sections will be in effect, there will be minimal fiscal implication for state government as a result of enforcing or administering the proposed amendments and new rules and there will be no fiscal implications for local governments as a result of enforcing or administering the proposed amendments and new rules because they do not enforce or administer the rule.

The Division may incur minimal costs associated with the preparation of training materials, presentations for system participants, and monitoring the activities of entities related to the implementation of these provisions.

Local and state government entities, when acting in the capacity of an insurance carrier, will be impacted in the same manner as other insurance carriers required to comply with the proposed amendments and new rule, as described later in this preamble.

There will be no measurable effect on local employment or the local economy as a result of the proposal.

Mr. Matthew Zurek also anticipates that for each year of the first five years the sections are in effect, the anticipated public benefit will be a medical billing system with well defined standards aligned, to the extent possible, with the national billing standards and requirements used in other health care systems. The use of standardized coding and billing methodologies in the rules as proposed is expected to maintain consistency and standardization in the Texas workers' compensation system with typical billing requirements used in Medicare and group health systems. Adopting the same national implementation specifications allows health care providers and other entities to use the same automated systems and clearinghouses as other health care systems, avoiding the cost of maintaining separate systems for workers' compensation medical bill submission and processing. Benefits of implementing the new standards would be the following: Cost savings due to consistent standards for electronic claims transactions and the ability to use the same automated system for workers' compensation transactions as other health care systems, as well as cost savings due to an increase in the use of electronic claims transactions.

All insurance carriers and health care providers will see benefits of migrating to the new standard due to the reduction of manual interventions and responding to phone calls related to the processing of medical bills in workers' compensation. For example, the current transaction sets do not provide a mechanism for an insurance carrier to provide tailored explanations regarding reductions applied to a medical bill. The new standards provide the mechanism to refer the health care provider to a specific medical policy or statement posted on the insurance carrier's website. Accordingly, greater specificity can be provided in the electronic explanation of benefits that may help avoid the submission of a request for reconsideration or for medical dispute resolution.

Savings Calculations

The possible benefit (savings) calculations related to the implementation of the new ASC X12 and NCPDP versions are well documented in the federal regulations. Information related to these issues may be found in the August 22, 2008 proposed rule (73 FR 49745-49749), the January 16, 2009 adopted rule (74 Federal Register 3296-3328), and in the 005010 Regulatory Impact Analysis Supplement located at http://www.cms.gov/TransactionCodeSetsStands/Downloads/5010RegulatoryImpactAnalysisSupplement.pdf. The following calculations are based on the same benefit assumptions and calculations contained in these documents, but modified for the specific benefits that would be applicable to the Texas workers' compensation implementation.

HEALTH CARE PROVIDERS

Health care provider implementing the new transaction sets are expected to experience savings in three primary areas: time incurred to resolve pended or incomplete claims; time incurred to resolve manually adjudicated medical bills; and the increased use of electronic medical bills by insurance carriers.

The Regulatory Impact Analysis Supplement outlined that health care providers spend approximately 10 minutes to resolve issues associated with pended or incomplete medical bills, which occurs on approximately 14% of all medical bills at an estimated cost of $3.20 per medical bill. The new transaction sets are expected to reduce the number of pended or incomplete medical bills by 0.28% to 0.7%. Based on inquiries made to insurance carrier electronic medical billing agents in 2009 compared with the number of bills reported by insurance carriers to the Division, it appears that approximately 41.2% of all medical bills are currently being submitted electronically. For dates of service in 2008, the Division received medical billing data for 3,802,516 professional, institutional, dental, and pharmacy medical bills. Based on these figures, approximately 1,566,637 medical bills are submitted electronically and 14% of this figure (the number of pended or incomplete medical bills) equals 219,329. Assuming the minimum reduction of 0.28%, it is estimated that the implementation of the 005010 and D.0 transaction sets will save Texas workers' compensation health care providers approximately $196,519 associated with pended and incomplete medical bills.

The Regulatory Impact Analysis Supplement outlined that health care providers spend approximately 6 minutes to resolve issues associated with manually adjudicated medical bills, which occurs on approximately 29% of all medical bills at an estimated cost of $2.88 per medical bill. The new transaction sets are expected to reduce the number of manually adjudicated medical bills by 1.45% to 2.9%. Based on inquiries made to insurance carrier electronic medical billing agents in 2009 compared with the number of bills reported by insurance carriers to the Division, it appears that approximately 41.2% of all medical bills are currently being submitted electronically. For dates of service in 2008, the Division received medical billing data for 3,802,516 professional, institutional, dental, and pharmacy medical bills. Based on these figures, approximately 1,566,637 medical bills are submitted electronically and 29% of this figure (the

number of manually adjudicated medical bills) equals 454,325. Assuming the minimum reduction of 1.45%, it is estimated that the implementation of the 005010 and D.0 transaction sets will save Texas workers' compensation health care providers approximately $1,897,260 associated with manually adjudicated medical bills.

The Regulatory Impact Analysis Supplement outlined that health care providers save approximately $.55 for each electronically submitted medical bill as compared with the costs of submitting paper medical bills. This document estimated that more medical bills will be able to be submitted electronically, with the increase equating to 2% to 5% of the total number of electronically submitted medical bills. Based on inquiries made to insurance carrier electronic medical billing agents in 2009 compared with the number of bills reported by insurance carriers to the Division, it appears that approximately 41.2% of all medical bills are currently being submitted electronically. For dates of service in 2008, the Division received medical billing data for 3,802,516 professional, institutional, dental, and pharmacy medical bills. Based on these figures, approximately 1,566,637 medical bills are submitted electronically and 2% of this figure (the minimum number of new electronic medical bills) equals 31,333. Accordingly, it is estimated that the implementation of the 005010 and D.0 transaction sets will save Texas workers' compensation health care providers approximately $17,233 related to the increase in the ability to submit medical bills electronically to insurance carriers.

INSURANCE CARRIERS

Insurance carriers implementing the new transaction sets are expected to experience savings in same three primary areas as health care providers: time incurred to resolve pended or incomplete claims; time incurred to resolve manually adjudicated medical bills; and the increased use of electronic medical bills by health care providers.

The Regulatory Impact Analysis Supplement outlined that health plans spend approximately 5 minutes to resolve issues associated with pended or incomplete medical bills, which occurs on approximately 14% of all medical bills at an estimated cost of $1.60 per medical bill. The new transaction sets are expected to reduce the number of pended or incomplete medical bills by 0.28% to 0.7%. Based on inquiries made to insurance carrier electronic medical billing agents in 2009 compared with the number of bills reported by insurance carriers to the Division, it appears that approximately 41.2% of all medical bills are currently being submitted electronically. For dates of service in 2008, the Division received medical billing data for 3,802,516 professional, institutional, dental, and pharmacy medical bills. Based on these figures, approximately 1,566,637 medical bills are submitted electronically and 14% of this figure (the number of pended or incomplete medical bills) equals 219,329. Assuming the minimum reduction of 0.28%, it is estimated that the implementation of the 005010 and D.0 transaction sets will save Texas workers' compensation insurance carriers approximately $98,259 associated with pended and incomplete medical bills.

The Regulatory Impact Analysis Supplement outlined that health plans spend approximately 5 minutes to resolve issues associated with manually adjudicated medical bills, which occurs on approximately 29% of all medical bills at an estimated cost of $2.40 per medical bill. The new transaction sets are expected to reduce the number of manually adjudicated medical bills by 1.45% to 2.9%. Based on inquiries made to insurance carrier electronic medical billing agents in 2009 compared with the number of bills reported by insurance carriers to the Division, it appears that approximately 41.2% of all medical bills are currently being submitted electronically. For dates of service in 2008, the Division received medical billing data for 3,802,516 professional, institutional, dental, and pharmacy medical bills. Based on these figures, approximately 1,566,637 medical bills are submitted electronically and 29% of this figure (the number of manually adjudicated medical bills) equals 454,325. Assuming the minimum reduction of 1.45%, it is estimated that the implementation of the 005010 and D.0 transaction sets will save Texas workers' compensation insurance carriers approximately $1,587,050 associated with manually adjudicated medical bills.

The Regulatory Impact Analysis Supplement outlined that health plans save approximately $.18 for each electronically submitted medical bill as compared with the costs of submitting paper medical bills. This document estimated that more medical bills will be able to be submitted electronically, with the increase equating to 2% to 5% of the total number of electronically submitted medical bills. Based on inquiries made to insurance carrier electronic medical billing agents in 2009 compared with the number of bills reported by insurance carriers to the Division, it appears that approximately 41.2% of all medical bills are currently being submitted electronically. For dates of service in 2008, the Division received medical billing data for 3,802,516 professional, institutional, dental, and pharmacy medical bills. Based on these figures, approximately 1,566,637 medical bills are submitted electronically and 2% of this figure (the minimum number of new electronic medical bills) equals 31,333. Accordingly, it is estimated that the implementation of the 005010 and D.0 transaction sets will save Texas workers' compensation insurance carriers approximately $5,640 related to the increase in the ability to submit medical bills electronically by health care providers.

BENEFITS SUMMARY

In summary, during the first two years after adoption, it is estimated that the aggregate savings for all system participants to implement the new national standards and standardized billing requirements required under Labor Code §413.011 would be approximately $3,795,960. In addition, there will be additional savings associated with eliminating the need to maintain duplicate billing systems, which have not been quantified in this preamble. Additional savings are anticipated after implementation due to the likelihood of a continued increase in the number of electronically submitted medical bills, but at a slower penetration rate than the initial two years after implementation.

Cost Calculations

For entities covered by these proposed rules and that are subject to the standards adopted under the Health Insurance Portability & Accountability Act of 1996 (HIPAA), the cost of migrating to the new transaction standards is a result of the federal regulations and not these proposed rules. For the other non-HIPAA entities, such as workers' compensation carriers that do not have other lines of insurance, it is anticipated that the cost of migration would be similar to the cost estimates for HIPAA covered entities contained in the federal regulations.

HEALTH CARE PROVIDERS, OTHER THAN PHARMACIES

For health care providers who have implemented the current transaction standards, there will be no economic cost as a result of these proposed amendments and new rules. Use of those transaction standards, which will be implemented under the proposed sections, will enable the same automated systems to be used in the Texas workers' compensation system.

Health care providers that are exempt from electronic medical billing under the proposed rules will experience minimal costs associated with the proposed changes in completing paper medical bills. Health care providers or their billing agents will continue to be required to ensure that the required data elements are included on the paper medical bills. For health care providers that are exempt from electronic medical billing under the proposed rules and that elect to use an automated solution rather than manual data entry of the required data elements, it is anticipated that approximately four hours of programming time may be necessary to modify any proprietary systems used by these health care providers to align with the new requirements for the submission of professional medical bills. Health care providers that currently utilize practice management systems that are aligned with the standards will not incur this particular cost. In addition, health care providers that complete their medical bills manually will also not incur this additional programming cost. Based on a review of the data contained in the Division's Medical State Reporting database for certain health care provider demographics, 6,173 of the 22,290 billing providers submitted 20 or less workers' compensation medical bills for calendar year 2008. Given the requirements related to electronic medical records and transactions under other regulations, it is estimated that approximately 30 percent of these entities will seek an automated solution to meet the requirements and will incur the programming costs associated with the change for professional medical bills. This anticipated cost is derived from the product of the percentage of health care providers that will likely seek an automated solution (30 percent of 6,173) multiplied by the costs of programming (four hours of programming at $28.00 per hour). Accordingly, it appears that the aggregate cost of implementation for these billing providers would be approximately $207,413.

The costs related to the implementation of the Version 004010 and the potential cost of migrating to Version 005010 are well documented in the federal regulations. Information related to these issues may be found in the August 22, 2008 proposed rule (73 FR 49745-49749), the January 16, 2009 adopted rule (74 Federal Register 3296-3328), and in the 005010 Regulatory Impact Analysis Supplement located at http://www.cms.gov/TransactionCodeSetsStands/Downloads/5010RegulatoryImpactAnalysisSupplement.pdf. However, the types and numbers of transactions required under the HIPAA regulations are different than the Texas workers' compensation implementation. Excluding standard acknowledgments and responses, doctors are required to implement seven distinct Version 005010 operational transaction sets under the HHS requirements and workers' compensation doctors are required to implement four distinct 005010 transaction sets under the Texas workers' compensation requirements. If the transaction costs are considered similar, then the Texas implementation is estimated to cost approximately 57 percent of the HHS implementation.

HHS estimated that 3.4 billion transactions would cost health care providers approximately $435 million, or $0.13 per transaction. Given that the Texas workers' compensation implementation is estimated to cost 57 percent of the HHS required implementation, then the per-transaction cost of implementing the Version 005010 transaction sets is estimated to be $0.07 per transaction for health care providers that are not HIPAA-covered entities nor exempt. Given that there is no solid data to confirm the number of Texas workers' compensation health care providers that fall into this category, some assumptions and data extrapolations were needed to estimate this percentage. Based on a review of the data contained in the Division's Medical State Reporting database for health care providers that had applied for electronic medical billing financial burden waivers under the current rules, these health care providers submitted 7,691 medical bills in calendar year 2008, or approximately 0.3 percent of the total volume of professional medical bills. If it is assumed that these health care providers represent only one percent of the total number of workers' compensation health care providers that are not HIPAA-covered entities nor, then it is conservatively estimated that the transaction volume impacted by this transition will equate to 3 percent of all professional medical bills. Given the proposed exemptions compared to the current rule language and the general patient mix for health care providers, it does not appear that institutional or dental medical bills will be impacted by this change. For dates of service in 2008, the Division received medical billing data for 2,443,371 professional medical bills. Accordingly, it is estimated that the implementation of the 005010 transaction sets for Texas workers' compensation health care providers that are neither HIPAA-covered entities nor exempt from electronic medical bill submission will have an aggregate cost of $5,131 for the initial implementation and testing of the new 005010 transaction sets (the product of 2,443,371 multiplied by .03 multiplied by $.07).

PHARMACIES

For pharmacies and pharmacy processing agents, it is noted that most pharmacy chains and independent pharmacies are HIPAA-covered entities. As such, any costs associated with migrating from the Version 5.1 to the Version D.O standards are the result of federal regulations and not these proposed rules. If there is an independent pharmacy that provides pharmacy services and products only to workers' compensation injured employees, the cost of implementing Version D.O is anticipated to be the similar to the HHS estimates, which anticipate an increase in the monthly maintenance fees charged between vendors and the pharmacies to be between .50 and 1 percent, or $2.50 to $5.00 per month per pharmacy. In addition, there is at least one pharmacy processing agent, which represents hundreds of small pharmacies, that has asserted that their market is strictly workers' compensation. For that entity, the cost of implementing Version D.O is estimated to be the equivalent of a small pharmacy chain similar to the HHS estimate of $100,000. In summary, the aggregate cost of implementing the new Version D.O standard for workers' compensation pharmacies and pharmacy processing agents, including the cost to the pharmacy processing agent noted above, is not anticipated to exceed $100,500.

Pharmacies that are exempt from electronic medical billing under the proposed rules will experience minimal costs associated with the proposed changes in completing paper medical bills. Pharmacies and pharmacy processing agents will be required to ensure that the required data elements are included on the paper medical bills and modify the layout for the new Division form, DWC-066, "Statement of Pharmacy Services." It is anticipated that approximately 10 hours of programming time may be necessary to modify any proprietary systems used by these pharmacies to align with the new requirements to correctly print out the paper forms with the required information. It is noted that the majority of pharmacies in the workers' compensation system are associated with pharmacy benefit management companies or pharmacy processing agents. Accordingly, the number of entities required to implement these changes is much less than the total number of pharmacies. Based on the Division's review of available information, it is estimated that approximately 25 percent of the 6,364 licensed pharmacies choose to implement an automated solution independent of contractual relationships with

other entities, it appears that the aggregate cost of implementing the automation changes for these pharmacies would be approximately $418,700, including the D.0 transaction implementation costs.

INSURANCE CARRIERS

Insurance carriers have already incurred the costs associated with implementing automated systems capable of receiving and processing electronic medical bill transactions to comply with the current adopted rules, so the impact of this proposal will be limited. 28 Texas Administrative Code §133.500 and §133.501 were adopted to be effective August 10, 2006, 31 TexReg 6230.

The cost of migrating to the new standards will involve a number of different aspects, including the analysis of business flow changes, software procurement or customized software development, integration of new software into existing systems, staff training, collection of new data, testing, and transition processes. Systems implementation costs would account for most of the costs, with system testing alone accounting for 60 to 70 percent of costs for all affected entities. Since the transition to Version 005010 is less complex than the initial implementation of Version 004010A1, costs such as hardware procurement will not need to be repeated for Version 005010. In summary, HHS anticipates that the implementation of Version 005010 would represent between 20 to 40 percent of the cost to implement Version 004010A1. The costs related to transitioning to the new standards would be expected to be incurred in the first three years after the adoption of these proposed amendments and new rules.

The costs related to the implementation of the Version 004010 and the potential cost of migrating to Version 005010 is well documented in the federal regulations. However, the types and numbers of transactions required under the HIPAA regulations are different than those under the Texas workers' compensation implementation. Excluding standard acknowledgments and responses, health plans are required to implement 11 distinct Version 005010 operational transaction sets under the HHS requirements and insurance carriers are required to implement six distinct 005010 transaction sets under the Texas workers' compensation requirements. If the transaction costs are considered similar, then the Texas implementation is estimated to cost approximately 55 percent of the HHS implementation.

HHS estimated that 4.3 billion transactions would cost health plans approximately $3.6 billion, or $0.84 per transaction. Given that the Texas workers' compensation implementation is estimated to cost 55 percent of the HHS required implementation, then the per-transaction cost of implementing the Version 005010 transaction sets is estimated to be $0.46 per transaction. Based on inquiries made to insurance carrier electronic medical billing agents in 2009 compared with the number of bills reported by insurance carriers to the Division, it appears that approximately 41.2 percent of all medical bills are currently being submitted electronically. Given that the exemptions contained in this proposed rule do not dramatically alter health care provider requirements, this percentage is a reasonable basis for determining migration costs. In addition, it is noted that the majority of insurance carriers receive pharmacy billing from pharmacy benefit management companies and pharmacy processing agents that are able to convert the data to comply with the requirements of their current legacy systems. However, the changes in the data content for pharmacy transactions will likely require modifications to certain automated systems to ensure efficient pharmacy bill processing. Based upon the similarities between the data content changes in the ASC X12 transactions and the NCPDP D.0 transactions, it is reasonable to assume that the costs will be similar in nature. For dates of service in 2008, the Division received medical billing data for 3,802,516 professional, institutional, dental, and pharmacy medical bills. Accordingly, it is estimated that the implementation of the 005010 and D.0 transaction sets for Texas workers' compensation insurance carriers will have an aggregate cost of approximately $720,653 for the initial implementation and testing of the new 005010 and D.0 transaction sets.

COST SUMMARY

In summary, during the first two years after adoption, it is estimated that the aggregate costs for all system participants to implement the new national standards and standardized billing requirements required under Labor Code §413.011 would be approximately $1,351,897. Additional costs are not anticipated after implementation and any costs in subsequent fiscal years would be restricted to standard system maintenance.

General Economic Impact Statement

In accordance with the Government Code §2006.002(c), the Division has determined that this proposal will not have an adverse economic effect on small businesses, but may have some adverse economic impact on certain micro businesses. Small and micro businesses impacted by this proposal include most health care providers participating in the workers' compensation system and certain insurance carriers providing workers' compensation coverage. Department records as of May 2010 show there are 30 insurance carriers licensed in Texas receiving workers' compensation or excess workers' compensation premiums that qualify as small or micro businesses. According to Texas Workforce Commission's Standardized Occupational Components for Research and Analysis of Trends in the Employment System (SOCRATES), there are 30,880 health care provider employers, of which 6,355 may be classified as small businesses and 22,995 may be classified as micro businesses.

Insurance Carriers

Labor Code §408.0251 requires insurance carriers to accept electronic medical bills submitted by health care providers in accordance with Division rules. As such, the requirement to receive these electronic transactions is the result of the statutory provisions and not the rules adopted by the agency. It is anticipated that the costs of implementation for these insurance carriers will be similar to the other insurance carriers that are not classified as small or micro businesses. Insurance carriers have the ability to secure various types of services from vendors, which may include integration with legacy medical bill processing systems. Accordingly, any small or micro insurance carrier will be able to assert influence over the total costs of any system conversions. Lastly, the proposed regulations provide an expanded list of reasons that these entities may be exempt from this process, which will remove any adverse impact from many of these entities.

According to Division records, there are no self-insured employers that would be considered small or micro businesses. Therefore, there are no self-insured employers impacted by these proposed amendments and new section that would incur costs different than experienced by other insurance carriers.

Health Care Providers

As explained in the Public Benefit/Cost Note, the majority of health care providers are subject to the provisions of the standards adopted under the Health Insurance Portability & Account-

ability Act of 1996 (HIPAA) in 45 Code of Federal Regulations Parts 160 and 162 as amended by the rule (74 Federal Register 3296-3328) adopted on January 16, 2009 by the Secretary of Health and Human Services (HHS). In addition, CMS requires all health care providers with 10 or more employees to submit medical bills electronically. Accordingly, health care providers that could be classified as small businesses are required to transition to the new standards under federal regulations. Health care providers that may be classified as micro businesses fall into two distinct categories under the provisions of the rules. For those that have 10 or more employees, health care providers are required to transition to the new standards under federal regulations. However, it is noted that some of these micro-businesses may not be heavily involved in the workers' compensation system and may have some potential impact due to their business partners and the existence, or non-existence, of automated systems in their practices. In order to help address and minimize this impact, the proposed subsection provides for an exemption based on the number of workers' compensation patients served by the health care provider. Health care providers in this category that treat workers' compensation patients and have no automated system will be required to implement either electronic medical billing software or a practice management system with electronic data interchange capabilities. These software packages range in price from "free" web-based transaction systems to integrated solutions costing thousands of dollars. The decision on which system meets the needs of an individual health care provider is a business decision and is not dictated by these proposed amendments or new section. In addition, some health care providers choose not to treat workers' compensation patients and will not be impacted by the proposed amendments and new section. For those health care providers with less than ten employees, a potential for an adverse impact does not exist because they are exempt from the electronic medical billing requirements, removing any potential adverse impact. These health care providers will likely manually input any paper medical bill form data requirement changes, as opposed to modifying automated systems that have already been developed and deployed.

Summary

Except for certain micro-businesses that choose to implement new automated solutions, there will be no difference in the cost of compliance between a large, small or micro business as a result of the proposed amendments and new section. The additional costs for the limited number of adversely impacted health care providers is mitigated by their choice to treat workers' compensation patients, their selection of a business solution, and their ability to meet the criteria for an exception to these requirements.

The Division also considered not adopting the proposed amendments, implementing different requirements or standards for the affected small and micro-businesses, and exempting the requirements of the proposed amendments and new section.

Not adopting the proposed amendments and new sections. The Division rejected this approach because it would not comply with the requirements of Labor Code §408.0251, which requires the Commissioner to adopt rules related to electronic medical bill submission and processing. Section 408.0251(c) also directs the Commissioner to adopt rules establishing the criteria for granting exceptions to the electronic medical bill submission and processing requirements.

Implementing different requirements or standards for the affected small or micro-businesses. The Division rejected this option because implementing different requirements or standards would not be consistent with the requirements of Labor Code §413.011, which requires that workers' compensation medical billing requirements to achieve standardization with the billing requirements and standards adopted by CMS. Allowing or requiring different standards would increase the complexity of the system and the costs associated with supporting different formats and protocols. This approach would require all insurance carriers to support duplicate and redundant systems, increasing the administrative costs associated with the receipt and processing of workers' compensation medical bills.

Exempting small and micro-businesses from the requirements of the proposed amendments and new sections. The Division has expanded the list of reasons that these entities may use to be exempt from the electronic medical bill submission and processing requirements. If the small or micro-business meets the criteria contained in the proposed language, they will be exempt from the requirement. If they do not meet these criteria and implementation will not be financially reasonable, the proposed amendments include a process to seek an individual exemption from the requirements.

The Division has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under Texas Government Code §2007.043.

To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. CST on January 3, 2011. Comments may be submitted via the internet through the Division's internet website at http://www.tdi.state.tx.us/wc/rules/proposedrules/index.html, by email at rulecomments@tdi.state.tx.us or by mailing or delivering your comments to Maria Jimenez, Texas Department of Insurance, Division of Workers' Compensation, Workers' Compensation Counsel, MS-4D, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645.

Any request for a public hearing must be submitted separately to the Texas Department of Insurance, Division of Workers' Compensation, Workers' Compensation Counsel, MS-1, 7551 Metro Center Drive, Austin, Texas 78744 by 5:00 p.m. CST by the close of the comment period. If a hearing is held, written and oral comments presented at the hearing will be considered.

SUBCHAPTER B. HEALTH CARE PROVIDER BILLING PROCEDURES

28 TAC §133.10

The amendments are proposed under the Labor Code §§402.00111, 402.061, 408.0251, and 413.011. Labor Code §402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority under Title 5 of the Labor Code. Labor Code §402.061 provides that the Commissioner of Workers' Compensation shall adopt rules as necessary for the implementation and enforcement of the Texas Workers' Compensation Act.

Labor Code §408.0251 requires the Commissioner of Workers' Compensation to adopt rules related to electronic billing requirements. Labor Code §413.011 requires the Commissioner

of Workers' Compensation to adopt rules aligned with Centers for Medicare and Medicaid Services coding and billing policies.

The following statutes are affected by this proposal: §133.10, Insurance Code §§1305.001, et seq., Labor Code §§408.0251, 413.011, and 504.053.

§133.10. Required Billing Forms/Formats.

(a) Health care providers, including those providing services for a certified workers' compensation health care network as defined in Insurance Code Chapter 1305 or to political subdivisions with contractual relationships under Labor Code §504.053(b)(2), shall submit medical bills for payment in an electronic format in accordance with §133.500 and §133.501 of this title (relating to Electronic Formats for Electronic Medical Bill Processing and Electronic Medical Bill Processing), unless the health care provider or the billed insurance carrier is exempt from the electronic billing process in accordance with §133.501 of this title.[~~:~~]

[~~(1) on standard forms used by the Centers for Medicare and Medicaid Services (CMS);~~]

[~~(2) on applicable forms prescribed for pharmacists and dentists specified in subsections (b) and (c) of this section; or~~]

[~~(3) in electronic format in accordance with Subchapter G of this chapter (relating to Electronic Medical Billing, Reimbursement, and Documentation).~~]

(b) Except as provided in subsection (a) of this section, health care providers, including those providing services for a certified workers' compensation health care network as defined in Insurance Code Chapter 1305 or to political subdivisions with contractual relationships under Labor Code §504.053(b)(2), shall submit paper medical bills for payment on:

(1) the 1500 Health Insurance Claim Form Version 08/05 (CMS-1500);

(2) the Uniform Bill 04 (UB-04); or

(3) applicable forms prescribed for pharmacists, dentists, and surgical implant providers specified in subsections (c), (d) and (e) of this section.

(c) [~~(b)~~] Pharmacists and pharmacy processing agents shall submit bills using the Division form DWC-66. A pharmacist or pharmacy processing agent may submit bills using an alternate billing form if:

(1) the insurance carrier has approved the alternate billing form prior to submission by the pharmacist or pharmacy processing agent; and

(2) the alternate billing form provides all information required on the Division form DWC-66.

(d) [~~(c)~~] Dentists shall submit bills for dental services using the 2006 [~~current~~] American Dental Association (ADA) Dental Claim [~~claim~~] form.

(e) Surgical implant providers requesting separate reimbursement for implantable devices shall submit bills using:

(1) the form prescribed in subsection (b)(1) of this section when the implantable device reimbursement is sought under §134.402 of this title (relating to Ambulatory Surgical Center Fee Guideline); or

(2) the form prescribed in subsection (b)(2) of this section when the implantable device reimbursement is sought under §134.403 or §134.404 of this title (relating to Hospital Facility Fee Guideline--Outpatient and Hospital Facility Fee Guideline--Inpatient).

(f) [~~(d)~~] All information submitted on required paper billing forms must be legible and completed in accordance with the instructions contained in this section. The parenthetical information following each term refers to the applicable paper medical billing form and the field number corresponding to the medical billing form. [~~Division instructions.~~]

(1) The following data content or data elements are required for a complete professional or noninstitutional medical bill related to Texas workers' compensation health care:

(A) patient's Social Security Number (CMS-1500/field 1a) is required;

(B) patient's name (CMS-1500/field 2) is required;

(C) patient's date of birth and gender (CMS-1500/field 3) is required;

(D) employer's name (CMS-1500/field 4) is required;

(E) patient's address (CMS-1500/field 5) is required;

(F) patient's relationship to subscriber (CMS-1500, field 6) is required;

(G) employer's address (CMS-1500, field 7) is required;

(H) workers' compensation claim number assigned by the insurance carrier (CMS-1500/field 11) is required when known, the billing provider shall enter 'UNKNOWN' if the workers' compensation claim number is not known by the billing provider;

(I) date of injury (CMS-1500, field 14) is required;

(J) name of referring provider or other source (CMS-1500, field 17) is required when another health care provider referred the patient for the services;

(K) referring provider's state license number (CMS-1500/field 17a) is required when there is a referring doctor listed in CMS-1500/field 17; the billing provider shall enter the '0B' qualifier and the license type, license number, and jurisdiction code (for example, 'MDF1234TX');

(L) referring provider's NPI number (CMS-1500/field 17b) is required when CMS-1500/field 17 contains the name of a health care provider eligible to receive an NPI number;

(M) diagnosis or nature of injury (CMS-1500/field 21) is required, at least one diagnosis code must be present;

(N) prior authorization number (CMS-1500/field 23) is required when preauthorization, concurrent review or voluntary certification was approved and the insurance carrier provided an approval number to the requesting health care provider;

(O) date(s) of service (CMS-1500, field 24A) is required;

(P) place of service code(s) (CMS-1500, field 24B) is required;

(Q) procedure/modifier code (CMS-1500, field 24D) is required;

(R) diagnosis pointer (CMS-1500, field 24E) is required;

(S) charges for each listed service (CMS-1500, field 24F) is required;

(T) number of days or units (CMS-1500, field 24G) is required;

(U) rendering provider's state license number (CMS-1500/field 24j, shaded portion) is required when the rendering provider is not the billing provider listed in CMS-1500/field 33; the billing provider shall enter the '0B' qualifier and the license type, license number, and jurisdiction code (for example, 'MDF1234TX');

(V) rendering provider's NPI number (CMS-1500/field 24j, unshaded portion) is required when the rendering provider is not the billing provider listed in CMS-1500/field 33 and the rendering provider is eligible for an NPI number;

(W) supplemental information (shaded portion of CMS-1500/fields 24d - 24h) is required when the provider is requesting separate reimbursement for surgically implanted devices or when additional information is necessary to adjudicate payment for the related service line;

(X) billing provider's federal tax ID number (CMS-1500/field 25) is required;

(Y) total charge (CMS-1500/field 28) is required;

(Z) signature of physician or supplier, the degrees or credentials, and the date (CMS-1500/field 31) is required, but the signature may be represented with a notation that the signature is on file and the typed name of the physician or supplier;

(AA) service facility location information (CMS-1500/field 32) is required;

(BB) service facility NPI number (CMS-1500/field 32a) is required when the facility is eligible for an NPI number;

(CC) billing provider name, address and telephone number (CMS-1500/field 33) is required;

(DD) billing provider's NPI number (CMS-1500/Field 33a) is required when the billing provider is eligible for an NPI number; and,

(EE) billing provider's state license number (CMS-1500/field 33b) is required when the billing provider has a state license number; the billing provider shall enter the '0B' qualifier and the license type, license number, and jurisdiction code (for example, 'MDF1234TX').

(2) The following data content or data elements are required for a complete institutional medical bill related to Texas workers' compensation health care:

(A) billing provider's name, address, and telephone number (UB-04/field 01) is required;

(B) patient control number (UB-04/field 03a) is required;

(C) type of bill (UB-04/field 04) is required;

(D) billing provider's federal tax ID number (UB-04/field 05) is required;

(E) statement covers period (UB-04/field 06) is required;

(F) patient's name (UB-04/field 08) is required;

(G) patient's address (UB-04/field 09) is required;

(H) patient's date of birth (UB-04/field 10) is required;

(I) patient's gender (UB-04/field 11) is required;

(J) date of admission (UB-04/field 12) is required when billing for inpatient services;

(K) admission hour (UB-04/field 13) is required when billing for inpatient services other than skilled nursing inpatient services;

(L) priority (type) of admission or visit (UB-04/field 14) is required;

(M) point of origin for admission or visit (UB-04/field 15) is required;

(N) discharge hour (UB-04/field 16) is required when billing for inpatient services with a frequency code of "1" or "4" other than skilled nursing inpatient services;

(O) patient discharge status (UB-04/field 17) is required;

(P) condition codes (UB-04/fields 18 - 28) are required when there is a condition code that applies to the medical bill;

(Q) occurrence codes and dates (UB-04/fields 31 - 34) are required when there is an occurrence code that applies to the medical bill;

(R) occurrence span codes and dates (UB-04/fields 35 and 36) are required when there is an occurrence span code that applies to the medical bill;

(S) value codes and amounts (UB-04/fields 39 - 41) are required when there is a value code that applies to the medical bill;

(T) revenue codes (UB-04/field 42) are required;

(U) revenue description (UB-04/field 43) is required;

(V) HCPCS/Rates (UB-04/field 44):

(i) HCPCS codes are required when billing for outpatient services and an appropriate HCPCS code exists for the service line item; and

(ii) accommodation rates are required when a room and board revenue code is reported;

(W) service date (UB-04/field 45) is required when billing for outpatient services;

(X) service units (UB-04/field 46) is required;

(Y) total charge (UB-04/field 47) is required;

(Z) date bill submitted, page numbers, and total charges (UB-04/field 45/line 23) is required;

(AA) insurance carrier name (UB-04/field 50) is required;

(BB) billing provider NPI number (UB-04/field 56) is required when the billing provider is eligible to receive an NPI number;

(CC) billing provider's state license number (UB-04/field 57) is required when the billing provider has a state license number; the billing provider shall enter the license number and jurisdiction code (for example, '123TX');

(DD) employer's name (UB-04/field 58) is required;

(EE) patient's relationship to subscriber (UB-04/field 59) is required;

(FF) patient's Social Security Number (UB-04/field 60) is required;

(GG) workers' compensation claim number assigned by the insurance carrier (UB-04/field 62) is required when known, the

billing provider shall enter 'UNKNOWN' if the workers' compensation claim number is not known by the billing provider;

(HH) preauthorization number (UB-04/field 63) is required when preauthorization, concurrent review or voluntary certification was approved and the insurance carrier provided an approval number to the health care provider;

(II) principal diagnosis code and present on admission indicator (UB-04/field 67) are required;

(JJ) other diagnosis codes (UB-04/field 67A- 67Q) are required when there conditions exist or subsequently develop during the patient's treatment;

(KK) admitting diagnosis code (UB-04/field 69) is required when the medical bill involves an inpatient admission;

(LL) patient's reason for visit (UB-04/field 70) is required when submitting an outpatient medical bill for an unscheduled outpatient visit;

(MM) principal procedure code and date (UB-04/field 74) is required when submitting an inpatient medical bill and a procedure was performed;

(NN) other procedure codes and dates (UB-04/fields 74A- 74E) are required when submitting an inpatient medical bill and other procedures were performed;

(OO) attending provider's name and identifiers (UB-04/field 76) are required for any services other than nonscheduled transportation services, the billing provider shall report the NPI number for an attending provider eligible for an NPI number and the state license number by entering the '0B' qualifier and the license type, license number, and jurisdiction code (for example, 'MDF1234TX');

(PP) operating physician's name and identifiers (UB-04/field 77) are required when a surgical procedure code is included on the medical bill, the billing provider shall report the NPI number for an operating physician eligible for an NPI number and the state license number by entering the '0B' qualifier and the license type, license number, and jurisdiction code (for example, 'MDF1234TX'); and

(QQ) remarks (UB-04/field 80) is required when separate reimbursement for surgically implanted devices is requested.

(3) The following data content or data elements are required for a complete pharmacy medical bill related to Texas workers' compensation health care:

(A) dispensing pharmacy's name and address (DWC-66/field 1) is required;

(B) date of billing (DWC-66/field 2) is required;

(C) dispensing pharmacy's National Provider Identification (NPI) number (DWC-66/field 3) is required;

(D) billing pharmacy's or pharmacy processing agent's name and address (DWC-66/field 4) is required when different from the dispensing pharmacy (DWC-66/field 1);

(E) invoice number (DWC-66/field 5) is required;

(F) payee's federal employer identification number (DWC-66/field 6) is required;

(G) insurance carrier's name (DWC-66/field 7) is required;

(H) employer's name and address (DWC-66/field 8) is required;

(I) injured employee's name and address (DWC-66/field 9) is required;

(J) injured employee's Social Security Number (DWC-66/field 10) is required;

(K) date of injury (DWC-66/field 11) is required;

(L) injured employee's date of birth (DWC-66/field 12) is required;

(M) prescribing doctor's name and address (DWC-66/field 13) is required;

(N) prescribing doctor's NPI number (DWC-66/field 14) is required;

(O) workers' compensation claim number assigned by the insurance carrier (DWC-66/field 15) is required when known, the billing provider shall enter 'UNKNOWN' if the workers' compensation claim number is not known by the billing provider;

(P) dispensed as written code (DWC-66/field 19) is required;

(Q) date filled (DWC-66/field 20) is required;

(R) generic National Drug Code (NDC) code (DWC-66/field 21) is required when a generic drug was dispensed or if dispensed as written code '2' is reported in DWC-66/field 19;

(S) name brand NDC code (DWC-66/field 22) is required when a name brand drug is dispensed;

(T) quantity (DWC-66/field 23) is required;

(U) days supply (DWC-66/field 24) is required;

(V) amount paid by the injured employee (DWC-66/field 26) is required if applicable;

(W) prescription number (DWC-66/field 28) is required;

(X) amount billed (DWC-66/field 29) is required; and

(Y) preauthorization number (DWC-66/field 30) is required when preauthorization, voluntary certification, or an agreement was approved and the insurance carrier provided an approval number to the requesting health care provider.

(4) The following data content or data elements are required for a complete dental medical bill related to Texas workers' compensation health care:

(A) type of transaction (ADA 2006 Dental Claim Form/field 1);

(B) preauthorization number (ADA 2006 Dental Claim Form/field 2) is required when preauthorization, concurrent review or voluntary certification was approved and the insurance carrier provided an approval number to the health care provider;

(C) insurance carrier name and address (ADA 2006 Dental Claim Form/field 3) is required;

(D) employer's name and address (ADA 2006 Dental Claim Form/field 12) is required;

(E) workers' compensation claim number assigned by the insurance carrier (ADA 2006 Dental Claim Form/field 15) is required when known, the billing provider shall enter 'UNKNOWN' if the workers' compensation claim number is not known by the billing provider;

(F) patient's name and address (ADA 2006 Dental Claim Form/field 20) is required;

(G) patient's date of birth (ADA 2006 Dental Claim Form/field 21) is required;

(H) patient's gender (ADA 2006 Dental Claim Form/field 22) is required;

(I) patient's Social Security Number (ADA 2006 Dental Claim Form/field 23) is required;

(J) procedure date (ADA 2006 Dental Claim Form/field 24) is required;

(K) tooth number(s) or letters(s) (ADA 2006 Dental Claim Form/field 27) is required;

(L) procedure code (ADA 2006 Dental Claim Form/field 29) is required;

(M) fee (ADA 2006 Dental Claim Form/field 31) is required;

(N) total fee (ADA 2006 Dental Claim Form/field 33) is required;

(O) place of treatment (ADA 2006 Dental Claim Form/field 38) is required;

(P) treatment resulting from (ADA 2006 Dental Claim Form/field 45) is required, the provider shall check the box for occupational illness/injury;

(Q) date of injury (ADA 2006 Dental Claim Form/field 46) is required;

(R) billing provider's name and address (ADA 2006 Dental Claim Form/field 48) is required;

(S) billing provider's NPI number (ADA 2006 Dental Claim Form/field 49) is required if the billing provider is eligible for an NPI number;

(T) billing provider's state license number (ADA 2006 Dental Claim Form/field 50) is required when the billing provider is a licensed health care provider; the billing provider shall enter the license type, license number, and jurisdiction code (for example, 'DS1234TX');

(U) billing provider's federal tax ID number (ADA 2006 Dental Claim Form/field 51) is required;

(V) rendering dentist's NPI number (ADA 2006 Dental Claim Form/field 54) is required when different than the billing provider's NPI number (ADA 2006 Dental Claim Form/field 49) and the rendering dentist is eligible for an NPI number;

(W) rendering dentist's state license number (ADA 2006 Dental Claim Form/field 55) is required when different than the billing provider's state license number (ADA 2006 Dental Claim Form/field 50), the billing provider shall enter the license type, license number, and jurisdiction code (for example, 'MDF1234TX'); and

(X) rendering provider's and treatment location address (ADA 2006 Dental Claim Form/field 56) is required when different from the billing provider's address (ADA Dental Claim Form/field 48).

(g) If the injured employee does not have a Social Security Number as required in subsection (f) of this section, the health care provider must use a default value of '999999999'.

(h) Except for facility state license numbers, state license numbers submitted under subsection (f) of this section will be in the following format: license type, license number, and jurisdiction state code (for example 'MDF1234TX').

(i) In reporting the state license number under subsection (f) of this section, health care providers should select the license type that most appropriately reflects the type of medical services they provided to the injured employees. When a health care provider does not have a state license number, the field is submitted with only the license type and jurisdiction code (for example, DMTX). The license types used in the state license format must be one of the following:

(1) AC for Acupuncturist;

(2) AM for Ambulance Services;

(3) AS for Ambulatory Surgery Center;

(4) AU for Audiologist;

(5) CN for Clinical Nurse Specialist;

(6) CP for Clinical Psychologist;

(7) CR for Certified Registered Nurse Anesthetist;

(8) CS for Clinical Social Worker;

(9) DC for Doctor of Chiropractic;

(10) DM for Durable Medical Equipment Supplier;

(11) DO for Doctor of Osteopathy;

(12) DP for Doctor of Podiatric Medicine;

(13) DS for Dentist;

(14) IL for Independent Laboratory;

(15) LP for Licensed Professional Counselor;

(16) LS for Licensed Surgical Assistant;

(17) MD for Doctor of Medicine;

(18) MS for Licensed Master Social Worker

(19) MT for Massage Therapist;

(20) NF for Nurse First Assistant;

(21) OD for Doctor of Optometry;

(22) OT for Occupational Therapist;

(23) PA for Physician Assistant;

(24) PM for Pain Management Clinic;

(25) PS for Psychologist;

(26) PT for Physical Therapist;

(27) RA for Radiology Facility; or

(28) RN for Registered Nurse.

(j) In reporting the resubmission condition code under subsection (f) of this section, the following definitions apply to the resubmission condition codes established by the National Uniform Billing Committee:

(1) W3 - Level 1 Appeal means a request for reconsideration under §133.250 of this title (relating to Reconsideration for Payment of Medical Bills) or an appeal of an adverse determination under Chapter 19, Subchapter U, of this title (relating to Utilization Reviews for Health Care Provided Under Workers' Compensation Insurance Coverage);

(2) W4 - Level 2 Appeal means a request for reimbursement as a result of a decision issued by the division, an Independent Review Organization, or a Network complaint process; and

(3) W5 - Level 3 Appeal means a request for reimbursement as a result of a decision issued by an administrative law judge or judicial review.

(k) The inclusion of the appropriate resubmission condition code and the original reference number is sufficient to identify a resubmitted medical bill as a request for reconsideration under §133.250 of this title or an appeal of an adverse determination under Chapter 19, Subchapter U, of this title provided the resubmitted medical bill complies with the other requirements contained in the appropriate section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 19, 2010.

TRD-201006651
Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Earliest possible date of adoption: January 2, 2011
For further information, please call: (512) 804-4703

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SUBCHAPTER G. ELECTRONIC MEDICAL BILLING, REIMBURSEMENT, AND DOCUMENTATION

28 TAC §§133.500 - 133.502

The amendments and new section are proposed under the Labor Code §§402.00111, 402.061, 408.0251, and 413.011. Labor Code §402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority under Title 5 of the Labor Code. Labor Code §402.061 provides that the Commissioner of Workers' Compensation shall adopt rules as necessary for the implementation and enforcement of the Texas Workers' Compensation Act.

Labor Code §408.0251 requires the Commissioner of Workers' Compensation to adopt rules related to electronic billing requirements. Labor Code §413.011 requires the Commissioner of Workers' Compensation to adopt rules aligned with Centers for Medicare and Medicaid Services coding and billing policies.

The following statutes are affected by this proposal: §133.500, Labor Code §408.0251 and §413.011; §133.501, Insurance Code §§1305.001, et seq., Labor Code §§408.0251, 413.011, and 504.053; §133.502, Labor Code §408.0251 and §413.011.

§133.500. Electronic Formats for Electronic Medical Bill Processing.

(a) For electronic transactions conducted before January 1, 2012, the [~~The~~] division adopts by reference the following electronic medical bill processing standards as adopted by the United States Department of Health and Human Services in 45 CFR §162.1102(b) and §162.1602(b) [~~prescribes standard electronic formats by adopting the following implementation guides for the medical billing transactions~~]:

(1) Professional Billing--the ASC X12N 837, Health Care Claim: Professional, Volumes 1 and 2, Version 004010, May 2000, Washington Publishing Company, 004010X098 and Addenda to Health Care Claim: Professional, Volumes 1 and 2, Version 4010, October 2002, Washington Publishing Company, 004010X098A1. [~~Billing:~~]

[~~(A) Professional Billing--ANSI x12 837(P) Version 4010.~~]

[~~(B) Institutional/Hospital Billing--ANSI x12 837(I) Version 4010.~~]

[~~(C) Dental Billing--ANSI x12 837(D) Version 4010.~~]

[~~(D) Pharmacy Billing--NCPDP Telecommunications Standard Version 5.1.~~]

(2) Institutional/Hospital Billing--the ASC X12N 837, Health Care Claim: Institutional, Volumes 1 and 2, Version 004010, May 2000, Washington Publishing Company, 004010X096 and Addenda to Health Care Claim: Institutional, Volumes 1 and 2, Version 4010, October 2002, Washington Publishing Company, 004010X096A1. [~~Acknowledgment:~~]

[~~(A) Functional Acknowledgment--ANSI x12 997 Version 4010.~~]

[~~(B) Detail Acknowledgment--ANSI x12 824 Version 4010.~~]

(3) Dental Billing--the ASC X12N 837, Health Care Claim: Dental, Version 004010, May 2000, Washington Publishing Company, 004010X097 and Addenda to Health Care Claim: Dental, Version 4010, October 2002, Washington Publishing Company, 004010X097A1. [~~Remittance-ANSI x12 835 Version 4010.~~]

(4) Retail Pharmacy Billing--the Telecommunication Standard Implementation Guide Version 5, Release 1 (Version 5.1), September 1999, National Council for Prescription Drug Programs and the Batch Standard Batch Implementation Guide, Version 1, Release 1 (Version 1.1), January 2000, supporting Telecommunication Standard Implementation Guide, Version 5, Release 1 (Version 5.1) for the NCPDP Data Record in the Detail Data Record, National Council for Prescription Drug Programs. [~~Reporting--IAIABC 837 Version 4010.~~]

(5) Remittance--the ASC X12N 835, Health Care Claim Payment/Advice, Version 004010, May 2000, Washington Publishing Company, 004010X091, and Addenda to Health Care Claim Payment/Advice, Version 4010, October 2002, Washington Publishing Company, 004010X091A1. [~~Documentation-ANSI x12 275 Version 4050.~~]

(b) For electronic transactions conducted before January 1, 2012, the division adopts by reference the following electronic medical bill processing standards [~~An implementation guide is a~~]:

(1) Acknowledgment: [~~specification document for national standard electronic formats as defined in subsection (a) of this section and published by a national standard setting organization that defines data requirements, data transaction sets, and data mapping; or~~]

(A) Electronic responses to ASC X12N 837 transactions:

(i) the TA1 Interchange Acknowledgment contained in the standards adopted under subsection (a) of this section;

(ii) the 997 Functional Acknowledgment contained in the standards adopted under subsection (a) of this section; and

(iii) the ASC X12N 824--Application Advice, Version 004010, February 2006, Washington Publishing Company, 004010X161.

(B) Electronic responses to National Council for Prescription Drug Programs (NCPDP) transactions, the Response contained in the standards adopted under subsection (a) of this section.

(2) Documentation submitted with an electronic medical bill: ASC X12N 275--Additional Information to Support a Health Claim or Encounter, Version 004050, May 2004, Washington Publishing Company, 004050X151. [~~published specification document that defines specific data requirements, data set transactions, data mapping, or data edits and is intended to accompany national standard implementation guides.~~]

(c) For electronic transactions conducted on or after January 1, 2012, the division adopts by reference the following electronic medical bill processing standards as adopted by the United States Department of Health and Human Services in 45 CFR §162.1102(c) and §162.1602(c) [~~Medical billing transactions must~~]:

(1) Professional Billing--the ASC X12 Standards for Electronic Data Interchange Technical Report Type 3, Health Care Claim: Professional (837), May 2006, ASC X12, 005010X222 and Type 3 Errata to Health Care Claim: Professional (837), June 2010, ASC X12, 005010X222A1. [~~contain all fields required in the applicable format implementation guide as set forth in subsection (a) of this section and associated Division implementation guides; and~~]

(2) Institutional/Hospital Billing--the ASC X12 Standards for Electronic Data Interchange Technical Report Type 3, Health Care Claim: Institutional (837), May 2006, ASC X12, 005010X223, Type 1 Errata to Health Care Claim: Institutional (837), ASC X12 Standards for Electronic Data Interchange Technical Report Type 3, October 2007, ASC X12, 005010X223A1, and Type 3 Errata to Health Care Claim: Institutional (837), June 2010, ASC X12, 005010X223A2. [~~be populated with current and correct values defined in the applicable implementation guide as set forth in subsection (a) of this section and associated Division implementation guides.~~]

(3) Dental Billing--the ASC X12 Standards for Electronic Data Interchange Technical Report Type 3, Health Care Claim: Dental (837), May 2006, ASC X12, 005010X224, Type 1 Errata to Health Care Claim: Dental (837), ASC X12 Standards for Electronic Data Interchange Technical Report Type 3, October 2007, ASC X12, 005010X224A1, and Type 3 Errata to Health Care Claim: Dental (837), June 2010, ASC X12, 005010X224A2.

(4) Retail Pharmacy Billing--the Telecommunication Standard Implementation Guide, Version D, Release 0 (Version D.0), August 2007, National Council for Prescription Drug Programs and the Batch Standard Batch Implementation Guide, Version 1, Release 2 (Version 1.2), January 2006, National Council for Prescription Drug Programs.

(5) Remittance--the ASC X12 Standards for Electronic Data Interchange Technical Report Type 3, Health Care Claim Payment/Advice (835), April 2006, ASC X12, 005010X221, and Type 3 Errata to Health Care Claim Payment/Advice (835), June 2010, ASC X12, 005010X224A1.

(d) For electronic transactions conducted on or after January 1, 2012, the division adopts by reference the following electronic medical bill processing standards: [~~Insurance carriers and health care providers may exchange electronic data in a non-prescribed format by mutual agreement. All data elements required in the Division prescribed formats must be present in a mutually agreed upon format.~~]

(1) Acknowledgment:

(A) Electronic responses to ASC X12N 837 transactions:

(i) the ASC X12 Standards for Electronic Data Interchange TA1 Interchange Acknowledgment contained in the standards adopted under subsection (c) of this section;

(ii) the ASC X12 Standards for Electronic Data Interchange Technical Report Type 3, Implementation Acknowledgment for Health Care Insurance (999), June 2007, ASC X12, 005010X231; and

(iii) the ASC X12 Standards for Electronic Data Interchange Technical Report Type 3, Health Care Claim Acknowledgment (277CA), January 2007, ASC X12, 005010X214.

(B) Electronic responses to NCPDP transactions, the Response contained in the standards adopted under subsection (c) of this section.

(2) Documentation submitted with an electronic medical bill: ASC X12N 275-Additional Information to Support a Health Claim or Encounter, Version 005010, February 2008, Washington Publishing Company, 005010X210.

(e) Electronic medical billing transactions must:

(1) contain all fields required in the applicable standard as set forth in subsection (a) or (c) of this section and the data requirements contained in §133.502 of this title (relating to Electronic Medical Billing Supplemental Data Requirements); and

(2) be populated with current and valid values defined in the applicable standard as set forth in subsection (a) or (c) of this section, Chapter 134 of this title (relating to Benefits--Guidelines for Medical Services, Charges, and Payments), and the data requirements contained in §133.502 of this title.

(f) Insurance carriers and health care providers may exchange electronic data in a non-prescribed format by mutual agreement. All data elements required in the division prescribed formats must be present in a mutually agreed upon format.

(g) The implementation specifications for the ASC X12N and the ASC X12 Standards for Electronic Data Interchange may be obtained from the ASC X12, 7600 Leesburg Pike, Suite 430, Falls Church, VA 22043; Telephone (703) 970-4480; and FAX (703) 970-4488. They are also available through the internet at *http://www.X12.org.* A fee is charged for all implementation specifications.

(h) The implementation specifications for the retail pharmacy standards may be obtained from the National Council for Prescription Drug Programs, 9240 East Raintree Drive, Scottsdale, AZ 85260. Telephone (480) 477-1000; FAX (480) 767-1042. They are also available through the Internet at *http://www.ncpdp.org.* A fee is charged for all implementation specifications.

(i) The electronic medical bill processing standards adopted in subsection (a), (b), (c), and (d) and identified in subsections (g), and (h) of this section are available for inspection at the main office of the Texas Department of Insurance, Division of Workers' Compensation, 7551 Metro Center Drive, Suite 100, Austin, TX 78744 or any subsequent address of the division's main office.

§133.501. Electronic Medical Bill Processing.

(a) Applicability.

(1) This section applies [~~Electronic medical bill processing is the exclusive process~~] to the exchange of electronic medical bill data

in accordance with §133.500 of this title [~~chapter~~] (relating to Electronic Formats for Electronic Medical Bill Processing) for professional, institutional/hospital, pharmacy, and dental services. This section applies to all electronic medical bill processing, including transactions for medical services rendered under the provisions of Insurance Code Chapter 1305 or rendered to political subdivisions with contractual relationships under Labor Code §504.053(b)(2).

(2) Insurance carriers shall accept electronic medical bills from health care providers transmitted in accordance with §133.500 of this title [~~must be able to exchange electronic data by January 1, 2008~~] unless the insurance carrier is exempt [~~excepted~~] from the process in accordance with subsection (b) of this section [~~paragraph (6) of this subsection~~].

(3) Health care providers shall submit electronic medical bills to insurance carriers in accordance with §133.500 of this title [~~must be able to exchange electronic data by January 1, 2008~~] unless the health care provider or the billed insurance carrier is exempt [~~excepted~~] from the process in accordance with subsection (b) of this section [~~paragraph (5) of this subsection~~].

[~~(4) Health care providers and insurance carriers may contract with other entities for electronic medical bill processing. Insurance carriers and health care providers are responsible for the acts or omissions of its agents executed in the performance of services for the insurance carrier or health care provider.~~]

[~~(A) Health care provider agent is a person or entity that the health care provider contracts with or utilizes for the purpose of fulfilling the health care provider's obligations for electronic medical bill processing under the Texas Labor Code or Division rules.~~]

[~~(B) Insurance carrier agent is a person or entity that the insurance carrier contracts with or utilizes for the purpose of providing claims service or fulfilling the insurance carrier's obligations for electronic medical bill processing under the Texas Labor Code or Division rules.~~]

[~~(5) A health care provider is waived from the requirement to submit medical bills electronically to an insurance carrier if:~~]

[~~(A) the health care provider employs 10 or fewer full time employees, and workers' compensation constitutes less than 10% of their practice; or~~]

[~~(B) the health care provider requests and the Division approves a waiver. The Division will approve a request on a case-by-case basis and will base the decision on whether or not electronic billing causes an unreasonable financial burden on the health care provider.~~]

[~~(6) An insurance carrier is waived from the requirement to receive medical bills electronically from health care providers on approval from the Division. The Division may grant an exception on a case-by-case basis if an insurance carrier establishes that electronic billing will result in an unreasonable financial burden.~~]

(b) Exemptions [~~Electronic medical bill~~].

(1) A health care provider is exempt from the requirement to submit medical bills electronically to an insurance carrier if: [~~An electronic medical bill is a medical bill submitted electronically by a health care provider or an agent of the health care provider.~~]

(A) the health care provider employs fewer than 10 full time employees;

(B) the health care provider provided services to 32 or fewer injured employees during the preceding calendar year; or

(C) the health care provider can sufficiently demonstrate electronic medical bill implementation will create an unreasonable financial hardship and can provide supporting documentation such as financial statements and other documentation which reflect the cost of implementation.

(2) A health care provider who asserts an exemption under this subsection must provide all supporting documentation to the division within 15 days of a division request for documentation. [~~A complete electronic medical bill is an electronic medical bill that:~~]

[~~(A) is submitted in accordance with this chapter, and~~]

[~~(B) identifies the:~~]

[~~*(i)* injured employee;~~]

[~~*(ii)* employer;~~]

[~~*(iii)* insurance carrier;~~]

[~~*(iv)* health care provider; and~~]

[~~*(v)* service, supply, or medication.~~]

(3) An insurance carrier is exempt from the requirement to receive medical bills electronically from health care providers if: [~~The received date of an electronic medical bill is the date the bill is electronically transmitted in accordance with §102.4(p) of this title (relating to General Rules for Non-Division Communication). An electronic medical bill is considered received if it meets the criteria of a complete electronic medical bill.~~]

(A) the insurance carrier is placed in receivership;

(B) the insurance carrier was issued an initial license to write workers' compensation insurance by the Texas Department of Insurance during the current or preceding calendar year;

(C) the insurance carrier had less than 32 workers' compensation claims for which income or medical benefits were paid during the preceding calendar year;

(D) the insurance carrier no longer writes workers' compensation insurance in Texas and is only handling runoff claims;

(E) the insurance carrier was a certified self-insured employer under Labor Code, Chapter 407, or a self-insured group under Labor Code, Chapter 407A, which has withdrawn from the certified self-insurance program or group self-insurance; or

(F) the insurance carrier submits a request to the division with supporting documentation such as financial statements and other documents which reflect cost of implementation and sufficiently demonstrates that electronic medical bill implementation will create an unreasonable financial hardship and the Commissioner approves the request.

(4) An insurance carrier who asserts an exemption under this subsection must provide all supporting documentation to the division within 15 days of a division request for documentation.

(5) Insurance carriers shall submit notification to the division prior to the beginning of each calendar year for which they will assert an exemption to the electronic medical bill processing requirements. The required notification must include:

(A) federal tax identification number of the insurance carrier;

(B) contact information, including but not limited to the name, physical address, and telephone number; and

(C) a description regarding facts related to the exemption under paragraph (3) of this subsection asserted by the insurance carrier.

(c) Agents [~~Acknowledgment~~]. Health care providers and insurance carriers may contract with other entities for electronic medical bill processing. Insurance carriers and health care providers are responsible for the acts or omissions of their agents executed in the performance of services for the insurance carrier or health care provider.

[~~(1) A Functional Acknowledgment is an electronic notification to the sender of an electronic file that the file has been received and:~~]

[~~(A) accepted as a complete, correct file, or~~]

[~~(B) rejected with a valid rejection code.~~]

[~~(2) A Detail Acknowledgment is an electronic notification to the sender of an electronic transaction within an electronic file that the transaction has been received and:~~]

[~~(A) accepted as a complete, correct submission, or~~]

[~~(B) rejected with a valid rejection code.~~]

[~~(3) An insurance carrier must acknowledge receipt of an electronic medical bill by returning a Detail Acknowledgment within one business day of receipt of the electronic submission.~~]

[~~(A) Notification of a rejection is transmitted in a Detail Acknowledgment when an electronic medical bill does not meet the definition of a complete electronic medical bill or does not meet the edits defined in the applicable implementation guide or guides.~~]

[~~(B) A health care provider may not submit a duplicate electronic medical bill earlier than 45 days from the date submitted if an insurance carrier has acknowledged acceptance of the original complete electronic medical bill. A health care provider may submit a corrected medical bill electronically to the insurance carrier after receiving notification of a rejection. The corrected medical bill is submitted as a new, original bill.~~]

[~~(4) Acceptance of a complete medical bill is not an admission of liability by the insurance carrier. An insurance carrier may subsequently reject an accepted electronic medical bill if it is determined that the employer listed on the medical bill is not a policyholder of the insurance carrier.~~]

[~~(A) The subsequent rejection must occur no later than 7 days from the date of receipt of the complete electronic medical bill.~~]

[~~(B) The rejection transaction must clearly indicate the reason for the rejection is due to denial of liability.~~]

(d) Electronic medical bill [~~remittance notification~~].

(1) An electronic medical bill is a medical bill submitted electronically by a health care provider or its agent. [~~An electronic remittance notification is an explanation of benefits (EOB), submitted electronically regarding payment or denial of a medical bill, recoupment request, or receipt of a refund.~~]

(2) An insurance carrier shall take final action not later than the 45th day after the date the insurance carrier received a complete electronic medical bill. [~~An insurance carrier must provide an electronic remittance notification no later than 45 days after receipt of a complete electronic medical bill or within 5 days of generating a payment.~~]

(e) Acknowledgment [~~Electronic documentation~~].

(1) An insurance carrier must acknowledge receipt of an electronic medical bill by returning an acknowledgment within two working days of receipt of the electronic submission. The time frame for returning an incomplete medical bill contained in §133.200 of this title (relating to Insurance Carrier Receipt of Medical Bills from Health Care Providers) does not apply to an electronic medical bill. [~~Electronic documentation consists of medical reports and/or records submitted electronically that are related to an electronic medical bill.~~]

(A) Notification of a rejection is transmitted in an acknowledgment when an electronic medical bill does not meet the definition of a complete electronic medical bill or does not meet the edits defined in the applicable standard.

(B) A health care provider may not submit a duplicate electronic medical bill earlier than 45 days from the date submitted if an insurance carrier acknowledged receipt of the original complete electronic medical bill. A health care provider may submit a corrected medical bill electronically to the insurance carrier after receiving notification of a rejection. The corrected medical bill is submitted as a new, original bill.

(2) Acknowledgment of a medical bill is not an admission of liability by the insurance carrier. The insurance carrier may subsequently deny a medical bill for liability or other issues within the 45-day medical bill processing timeframe contained in Labor Code §408.027. [~~Complete electronic documentation related to an electronic medical bill:~~

[~~(A) is submitted by fax, electronic mail, or in an electronic format and~~]

[~~(B) identifies the:~~]

[~~*(i)* injured employee,~~]

[~~*(ii)* insurance carrier,~~]

[~~*(iii)* health care provider;~~]

[~~*(iv)* related medical bill(s), and~~]

[~~*(v)* date(s) of service.~~]

[~~(3) When a health care provider submits electronic documentation related to an electronic medical bill, the documentation must be submitted within 7 days of submission of the electronic medical bill.~~]

(f) Electronic remittance notification.

(1) An electronic remittance notification is an explanation of benefits (EOB), submitted electronically regarding payment or denial of a medical bill, recoupment request, or receipt of a refund.

(2) An insurance carrier must provide an electronic remittance notification no later than 45 days after receipt of a complete electronic medical bill or within 5 days of generating a payment. This requirement applies only to the date the electronic remittance is sent and does not modify the medical bill processing timeframes contained in Labor Code §408.027.

(g) Electronic documentation. Electronic documentation consists of medical documentation submitted electronically that is related to an electronic medical bill.

§133.502. Electronic Medical Billing Supplemental Data Requirements.

(a) In addition to the data requirements and standards adopted under §133.500(a) of this title (relating to Electronic Formats for Electronic Medical Bill Processing), all professional, institutional, and den-

tal electronic medical bills submitted before January 1, 2012 must contain:

(1) the telephone number of the submitter;

(2) the workers' compensation claim number assigned by the insurance carrier or, if that number is not known by the health care provider, a default value of "UNKNOWN";

(3) the injured employee's Social Security Number as the subscriber member identification number;

(4) the injured employee's date of injury;

(5) the rendering health care provider's state provider license number;

(6) the referring health care provider's state provider license number;

(7) the billing provider's state provider license number, if the billing provider has a state provider license number;

(8) the attending physician's state medical license number, when applicable;

(9) the operating physician's state medical license number, when applicable;

(10) the claim supplemental information, when electronic documentation is submitted with an electronic medical bill; and

(11) the resubmission condition code, when the electronic medical bill is a duplicate, request for reconsideration, or other resubmission.

(b) In reporting the injured employee Social Security Number and the state license numbers under subsection (a) of this section, health care providers must follow the data content and format requirements contained in §133.10 of this title (relating to Required Billing Forms/Formats).

(c) In addition to the data requirements contained in the standards adopted under §133.500(b) of this title, all professional, institutional, and dental electronic medical bills submitted on or after January 1, 2012 must contain:

(1) the telephone number of the submitter;

(2) the workers' compensation claim number assigned by the insurance carrier or, if that number is not known by the health care provider, a default value of "UNKNOWN";

(3) the injured employee's date of injury;

(4) the claim supplemental information, when electronic documentation is submitted with an electronic medical bill; and

(5) the resubmission condition code, when the electronic medical bill is a duplicate, request for reconsideration, or other resubmission.

(d) In addition to the data requirements contained in the standards adopted under §133.500 of this title, all pharmacy electronic medical bills must contain:

(1) the dispensing pharmacy's National Provider Identification number; and

(2) the prescribing doctor's National Provider Identification number.

(e) This section does not apply to paper medical bills submitted for payment under §133.10(b) of this title.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 19, 2010.

TRD-201006650
Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Earliest possible date of adoption: January 2, 2011
For further information, please call: (512) 804-4703

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CHAPTER 136. BENEFITS--VOCATIONAL REHABILITATION

28 TAC §136.1, §136.2

The Texas Department of Insurance (Department), Division of Workers' Compensation (Division) proposes amendments to §136.1 and §136.2 of this title (relating to Review of Employer Report of Injury and Registry of Private Providers of Vocational Rehabilitation Services).

The *Registry of Private Providers of Vocational Rehabilitation Services* (Registry) is established by Labor Code §409.012(d), which states that a private provider of vocational rehabilitation services may register with the Division.

The Commissioner of Workers' Compensation (Commissioner) is authorized to establish acceptable credentials to be on the Registry by Labor Code §409.012(e), which provides that the Commissioner may require by rule that a private provider of vocational rehabilitation services maintain certain credentials and qualifications in order to provide services in connection with a workers' compensation claim. The Commissioner has established the credentials and qualifications to be on the Registry in §136.2 of this title. Under that authority, the Commissioner proposes to expand the acceptable credentials to achieve the benefits discussed in the Public Benefit section of this preamble which is to provide a broader selection of vocational rehabilitation providers and to help ensure larger geographic coverage of services.

The proposed amendments add "Licensed Master Social Worker" and "Licensed Clinical Social Worker" to the list of acceptable credentials that an applicant must have to be on the Division's Registry §136.2(b)(5) of this title.

The proposed amendments also make nonsubstantive changes to conform to Labor Code requirements, current nomenclature, reformatting, and for clarification of terms.

The Registry is maintained by the Division and consists of providers who have applied to be on the Registry and have documented their qualifications. Individuals may apply to the Registry by submitting form DWC-065. A submitted form is reviewed by Division staff for completeness and sufficiency of documentation. Applicants for the Registry must provide business contact information as specified by §136.2(b)(1) - (3) of this title, and must document that the applicant possesses the experience in providing vocational rehabilitation and credentials required by §136.2(b)(4) and (5) of this title. Applicants must also provide documentation that describes the evaluation,

assessment, assistance, placement or support services specific to vocational rehabilitation services and that they have available as a private provider and the Division may deny a person from inclusion on the Registry if they fail to meet any of the requirements outlined above. The Division verifies credentials on an annual basis and notifies registrants by mail of the need to re-register. The Division removes individuals from the Registry if a registrant fails to re-register.

The Registry may be utilized by an insurance carrier in order to locate individuals qualified to provide vocational rehabilitation services for injured employees. Insurance carriers are required to ensure any individual contacted to provide vocational services is qualified to do so under applicable provisions of Labor Code, Title 5 and Division rules. Insurance carriers determine the use of a private provider of vocational rehabilitation services on a claim based on the individual circumstances associated with a claim.

Currently, there are 95 providers in the Registry. The names, addresses and telephone numbers of the providers in the Registry are available to the public on the Division's web site at http://www.tdi.state.tx.us/wc/indexwc.html.

The Division published an informal draft of the rule on the Division's website on September 7, 2010 and received 14 informal comments from system participants.

Proposed amendments to §136.1. Proposed amendments to §136.1 conform the rule to Labor Code requirements and current nomenclature, replacing "commission" with "division", "employee" with "injured employee", "Texas Rehabilitation Commission" with "Department of Assistive and Rehabilitative Services" and "office" with "central office."

Proposed amendments to §136.2. Proposed amendments to §136.2 conform the rule to Labor Code requirements and current nomenclature. Proposed amendments to subsection (a) replace "commission" with "division". Proposed amendments to subsection (b) replace "commission" with "division" and "Austin office" with "the division's central office."

Proposed amendments to subsection (b)(5) are substantive and add "Licensed Master Social Worker" and "Licensed Clinical Social Worker" to the list of acceptable credentials that an applicant must possess to be on the Registry. Proposed amendments to subsection (c) replace "commission" with "division". Proposed amendments to subsection (d) replace "commission" with "division" and clarify that the Registry shall be posted on the Division's web site.

Matthew Zurek, Executive Deputy Commissioner of Health Care Management and System Monitoring, has determined that for each year of the first five years the proposed rules will be in effect there will be minimal fiscal implications to state or local government as a result of enforcing or administering the proposed sections. The administration and maintenance of the Registry is a current and an ongoing function of the Division. The administrative workload is not expected to require an increase in expenditures. There will be no measurable effect on local employment or the local economy as a result of the proposed rules.

Local government and state government as a covered regulated entity will not be impacted by the proposed amendments.

Mr. Zurek has determined that for each year of the first five years the sections are in effect, the proposed amendments will not have a measurable effect on local employment or the local economy as a result of the proposed amendments.

Mr. Zurek has also determined that for each year of the first five years the proposed rules will be in effect the public benefit anticipated as a result of enforcing the rules is that there will be greater geographic coverage of services and a broader selection of vocational rehabilitation providers. Currently, there are approximately 95 providers in the Registry, located in approximately 30 different cities in Texas. There are approximately 7,500 Licensed Master Social Workers and approximately 6,500 Licensed Clinical Social Workers in Texas, located in approximately 160 counties. There will be a significant potential for greater provider selection and greater geographic coverage for insurance carriers to utilize private providers of vocational rehabilitation services. Insurance carriers will benefit from this change by having a wider selection of qualified individuals to provide vocational rehabilitation services. An insurance carrier should contact an appropriately qualified individual to provide vocational rehabilitation services.

As required by the Government Code §2006.002(c), the Division has determined that the proposal will not have an adverse economic effect on the small and micro-businesses that may be required to comply with the proposed amendments. No small or micro-businesses will be required to do anything under these proposed rules. Applying to the Registry is purely voluntary on a provider's part.

The Division has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. CST on January 3, 2011. Comments may be submitted via the internet through the Division's internet website at http://www.tdi.state.tx.us/wc/rules/proposedrules/index.html, by email at rulecomments@tdi.state.tx.us or by mailing or delivering your comments to Maria Jimenez, Texas Department of Insurance, Division of Workers' Compensation, Workers' Compensation Counsel, MS-4D, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645.

Any request for a public hearing must be submitted separately to the Texas Department of Insurance, Division of Workers' Compensation, Workers' Compensation Counsel, MS-1, 7551 Metro Center Drive, Austin, Texas 78744 by 5:00 p.m. CST by the close of the comment period. If a hearing is held, written and oral comments presented at the hearing will be considered.

The amendments are proposed under the Labor Code §§409.012, 402.00116, 402.00111, 402.061, and 402.00128. Section 409.012 provides that the Commissioner may require by rule that a private provider of vocational rehabilitation services maintain certain credentials and qualifications in order to provide services in connection with a workers' compensation insurance claim and that a private provider of vocational rehabilitation services may register with the Division. Section 402.00116 grants the powers and duties of chief executive and administrative officer to the Commissioner and the authority to enforce Title 5, Labor Code, and other laws applicable to the Division or Commissioner. Section 402.00111 provides that the Commissioner shall exercise all executive authority, including rulemaking authority, under Title 5, Labor Code. Section 402.061 provides the Commissioner the authority to adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act. Section 402.00128 vests general operational powers to the

Commissioner including the authority to delegate, and assess and enforce penalties as authorized by Title 5, Labor Code.

The following statutes are affected by this proposal: §136.1, Labor Code §409.012 and §136.2, Labor Code §409.012.

§136.1. Review of Employer Report of Injury.

(a) The division [~~commission~~] shall analyze each employer report of injury, within 30 days of its receipt, for any information indicating that the injured employee had or is likely to have:

(1) an amputation of:

(A) an arm or leg;

(B) three fingers or more; or

(C) the large toe or one-third of the foot or more;

(2) the loss of use of an arm or leg;

(3) a permanent spinal cord injury;

(4) a head injury;

(5) a heart attack or heart disease;

(6) an occupational disease;

(7) blindness or significant vision loss;

(8) severe or extensive burns;

(9) any other condition that indicates an impairment is likely; or

(10) any injury resulting in more than 30 days lost time. Such injury shall be reviewed and a determination made as to the degree of impairment and the appropriateness of vocational rehabilitation services.

(b) Whenever the division [~~commission~~] finds facts that suggest one or more of the conditions listed in subsection (a) of this section, the division [~~commission~~] shall notify the injured employee, the Department of Assistive and Rehabilitative Services [~~Texas Rehabilitation Commission~~], and the insurance carrier that the division [~~commission~~] has identified an injured [~~the~~] employee [~~as someone~~] who may be assisted by vocational rehabilitation. The notice shall:

(1) be made no later than 60 days after the date the division [~~commission~~] received the employer report of injury; and

(2) contain the following information:

(A) the workers' compensation claim number assigned by the division [~~commission~~];

(B) the address of the local office of the division [~~commission~~] assigned to manage the claim;

(C) the insurance carrier's name[~~,~~] and division [~~commission~~] assigned identification number (if any);

(D) the name, address, and phone number of the injured employee; and

(E) the condition listed in subsection (a) of this section, that indicates that the injured employee may be assisted by vocational rehabilitation.

(c) In addition to the information required by subsection (b) of this section, the division's [~~commission's~~] notice to the injured employee shall contain the following:

(1) the address and telephone number of the central office of the Department of Assistive and Rehabilitative Services [~~Texas Rehabilitation Commission that is closest to the employee's address~~];

(2) a brief description of the availability of private providers registered with the division [~~commission~~] according to §136.2 of this title (relating to Registry of Private Providers of Vocational Rehabilitation Services); and

(3) a statement that the division [~~commission~~] notified the Department of Assistive and Rehabilitative Services [~~Texas Rehabilitation Commission~~] and the insurance carrier that the injured employee may be assisted by vocational rehabilitation.

§136.2. Registry of Private Providers of Vocational Rehabilitation Services.

(a) The division [~~Commission~~] shall maintain a registry of private providers of vocational rehabilitation services (registry). A private provider may apply to the division [~~Commission~~] to be included in the registry.

(b) A private provider who wishes to be included in the registry shall complete a division [~~Commission~~] approved registration form. The registration form shall be submitted in the form, format, and manner prescribed by the division [~~Commission~~] to the division [~~Commission~~] at the division's central office [~~its Austin office~~], signed by the provider, and include the following information:

(1) the private provider's name, business name (if applicable), business address, and telephone number;

(2) an informational brochure that describes the evaluation, assessment, assistance, placement, or support services available from the private provider;

(3) the locations where the private provider renders services;

(4) a statement showing the private provider's education, training, or experience in vocational rehabilitation;

(5) a statement showing the private provider is credentialed as a Licensed Professional Counselor (LPC), Licensed Master Social Worker, Licensed Clinical Social Worker, Certified Case manager (CCM), Certified Rehabilitation Counselor (CRC), Certified Vocational Evaluator (CVE), or Certified Disability Management Specialist (CDMS); and

(6) a statement that only the credentialed private provider of vocational rehabilitation services will perform vocational rehabilitation services, although related services (such as initial claimant intake, providing job search skills, verifying job search efforts, liaison with potential employers) may be performed by non-credentialed individuals under their direction.

(c) The division [~~Commission~~] shall include in its registry, for a period of one year from the date the division [~~Commission~~] enters the private provider's name in the registry, a summary of the information provided on the registration form of each private provider who complies with the requirements of subsection (b) of this section.

(d) The division [~~Commission~~] shall provide a copy of the registry on the division's web site [~~for inspection by the public at the Commission's central office in Austin, Texas, and each local field office of the Commission~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 19, 2010.

TRD-201006652

Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Earliest possible date of adoption: January 2, 2011
For further information, please call: (512) 804-4703

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 9. TEXAS COMMISSION ON JAIL STANDARDS

CHAPTER 253. DEFINITIONS

37 TAC §253.1

The Commission on Jail Standards proposes an amendment to §253.1 regarding Definitions in order to standardize language throughout the Administrative Code and Occupations Code.

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§253.1. Definitions.

The following words and terms, when used in this part, shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (7) (No change.)

(8) Direct Supervision--An inmate supervision management style in which jailer(s) [~~corrections officer(s)~~] are stationed inside a housing unit 24 hours per day.

(9) - (11) (No change.)

(12) Guard Station--A designated space from which a jailer(s) [~~corrections officer~~] performs his/her functions.

(13) - (31) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 19, 2010.

TRD-201006623
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: January 2, 2011
For further information, please call: (512) 463-8236

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CHAPTER 255. RULEMAKING PROCEDURES

37 TAC §255.4

The Commission on Jail Standards proposes an amendment to §255.4 regarding Petitions of Interested Persons in order to comply with statute which requires that the agency either initiate rulemaking action or deny a petition within 60 days of receiving a petition.

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§255.4. Petitions of Interested Persons.

Any interested person may petition the commission requesting the adoption, amendment, or repeal of any of its rules. Within 60 [~~90~~] days after receiving such petition, the commission shall initiate rulemaking proceedings or deny the petition in writing, stating its reasons for the denial. In order to receive consideration by the commission, the petition must set forth:

(1) - (4) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 19, 2010.

TRD-201006624
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
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For further information, please call: (512) 463-8236

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CHAPTER 259. NEW CONSTRUCTION RULES

SUBCHAPTER B. NEW MAXIMUM SECURITY DESIGN, CONSTRUCTION AND FURNISHING REQUIREMENTS

37 TAC §259.115

The Commission on Jail Standards proposes an amendment to §259.115 regarding Functions in order to standardize language throughout the Administrative Code and Occupations Code by replacing the term guard with jailer.

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§259.115. Functions.

Minimum space allocations shall provide for the following:

(1) (No change.)

(2) Detention:

(A) - (C) (No change.)

(D) jailer [~~guard~~] stations.

(3) - (4) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 19, 2010.

TRD-201006626
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: January 2, 2011
For further information, please call: (512) 463-8236

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37 TAC §259.122

The Commission on Jail Standards proposes an amendment to §259.122 regarding Control Rooms/Jailer Stations in order to standardize language throughout the Administrative Code and Occupations Code by replacing the term guard with jailer.

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§259.122. Control Rooms/Jailer [~~Guard~~] Stations.

A sufficient number of control rooms/jailer [~~guard~~] stations shall be provided on each floor where inmates are housed. Staff toilets and lavatories shall be located within the security perimeter and in close proximity to control rooms and jailer [~~guard~~] stations. The design shall allow access to control rooms without requiring staff to enter inmate safety vestibules or inmate activity areas.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 19, 2010.

TRD-201006625
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: January 2, 2011
For further information, please call: (512) 463-8236

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37 TAC §259.167

The Commission on Jail Standards proposes an amendment to §259.167 regarding Audible Communication in order to standardize language throughout the Administrative Code and Occupations Code by replacing the corrections officer with jailer.

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§259.167. Audible Communication.

Two-way voice communication shall be available at all times between inmates and jailers [~~corrections officers~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 19, 2010.

TRD-201006627
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: January 2, 2011
For further information, please call: (512) 463-8236

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SUBCHAPTER C. NEW LOCKUP DESIGN, CONSTRUCTION AND FURNISHING REQUIREMENTS

37 TAC §259.216

The Commission on Jail Standards proposes an amendment to §259.216 regarding Functions in order to standardize language throughout the Administrative Code and Occupations Code by replacing the term guard with jailer.

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§259.216. Functions.

Minimum space allocations shall provide for the following:

(1) (No change.)

(2) Detention:

(A) - (C) (No change.)

(D) jailer [~~guard~~] stations.

(3) - (4) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 19, 2010.

TRD-201006634
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: January 2, 2011
For further information, please call: (512) 463-8236

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37 TAC §259.223

The Commission on Jail Standards proposes an amendment to §259.223 regarding Control Rooms/Jailer Stations in order to standardize language throughout the Administrative Code and Occupations Code by replacing the term guard with jailer.

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§259.223. Control Rooms/Jailer [~~Guard~~] Stations.

A sufficient number of control rooms/jailer [~~guard~~] stations shall be provided on each floor where inmates are housed. Staff toilets and lavatories shall be located within the security perimeter and in close proximity to control rooms and jailer [~~guard~~] stations. The design shall allow access to control rooms without requiring staff to enter inmate safety vestibules or inmate activity areas.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 19, 2010.

TRD-201006636
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: January 2, 2011
For further information, please call: (512) 463-8236

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37 TAC §259.263

The Commission on Jail Standards proposes an amendment to §259.263 regarding Audible Communication in order to standardize language throughout the Administrative Code and Occupations Code by replacing the term corrections officer with jailer.

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§259.263. Audible Communication.

Two-way voice communication shall be available at all times between inmates and jailers [~~corrections officers~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 19, 2010.

TRD-201006637
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: January 2, 2011
For further information, please call: (512) 463-8236

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SUBCHAPTER D. NEW MEDIUM SECURITY DESIGN, CONSTRUCTION AND FURNISHING REQUIREMENTS

37 TAC §259.313

The Commission on Jail Standards proposes an amendment to §259.313 regarding Functions in order to standardize language throughout the Administrative Code and Occupations Code by replacing the term guard with jailer.

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§259.313. Functions.

Minimum space allocations shall provide for the following.

(1) (No change.)

(2) Detention:

(A) - (C) (No change.)

(D) jailer [~~guard~~] stations.

(3) - (4) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 19, 2010.

TRD-201006639
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: January 2, 2011
For further information, please call: (512) 463-8236

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37 TAC §259.318

The Commission on Jail Standards proposes an amendment to §259.318 regarding Control Rooms/Jailer Stations in order to standardize language throughout the Administrative Code and Occupations Code by replacing the term guard with jailer.

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small

businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§259.318. Control Rooms/Jailer [~~Guard~~] Stations.

A sufficient number of control rooms/jailer [~~guard~~] stations shall be provided on each floor where inmates are housed. Staff toilets and lavatories shall be located within the security perimeter and in close proximity to control rooms and jailer [~~guard~~] stations. The design shall allow access to control rooms without requiring staff to enter inmate safety vestibules or inmate activity areas.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 19, 2010.

TRD-201006641
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: January 2, 2011
For further information, please call: (512) 463-8236

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37 TAC §259.357

The Commission on Jail Standards proposes an amendment to §259.357 regarding Audible Communication in order to standardize language throughout the Administrative Code and Occupations Code by replacing the term correctional officer with jailer.

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§259.357. Audible Communication.

Two-way voice communication shall be available at all times between inmates and jailers [~~corrections officers~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 19, 2010.

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Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: January 2, 2011
For further information, please call: (512) 463-8236

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CHAPTER 273. HEALTH SERVICES

37 TAC §273.2

The Commission on Jail Standards proposes an amendment to §273.2, concerning the restraint of pregnant inmates and a county's Health Services Plan to comply with changes enacted by the 81st Legislature.

Adan Munoz, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Munoz has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§273.2. Health Services Plan.

Each facility shall have and implement a written plan, approved by the Commission, for inmate medical, mental, and dental services. The plan shall:

(1) - (4) (No change.)

(5) provide procedures for medical, mental, nutritional requirements, special housing and appropriate work assignments for known pregnant inmates and the documented use of restraints during labor/delivery in accordance with Local Government Code §361.082 for known pregnant inmates;

(6) - (11) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 19, 2010.

TRD-201006622
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: January 2, 2011
For further information, please call: (512) 463-8236

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 12. TEXAS BOARD OF OCCUPATIONAL THERAPY EXAMINERS

CHAPTER 376. REGISTRATION OF FACILITIES

40 TAC §376.5

The Texas Board of Occupational Therapy Examiners proposes an amendment to §376.5, concerning Exemptions to Registration. The amendment will exempt the registration of facilities where Early Childhood Intervention (ECI) takes place.

John P. Maline, Executive Director of the Executive Council of Physical Therapy and Occupational Therapy Examiners, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Maline also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be the possibility of children receiving OT services in community settings as well as at home. ECI is regulated by the Department of Assistive and Rehabilitative Services (DARS) and needs not register with this board when they provide services in settings outside the client's home.

There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed rule may be submitted to Augusta Gelfand, OT Coordinator, Texas Board of Occupational Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701, or 512-305-6900, or through email: augusta@ptot.state.gov.

The amendment is proposed under the Occupational Therapy Practice Act, Title 3, Subtitle H, Chapter 456, Occupations Code, which provides the Texas Board of Occupational Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 454 of the Occupations Code is affected by this amended section.

§376.5. Exemptions to Registration.

A facility licensed under Subtitle B, Title 4, Health and Safety Code, is exempt from this definition, i.e., hospitals, nursing homes, ambulatory surgical centers, birthing centers, abortion, continuing care, personal care, and special care facilities. Colleges, universities, schools, [~~and~~] home health settings, and settings where Early Childhood Intervention (ECI) services take place are exempted from registration. These types of facilities are automatically exempt and are not required to obtain a formal exemption from the board.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 19, 2010.

TRD-201006658
John P. Maline
Executive Director
Texas Board of Occupational Therapy Examiners
Earliest possible date of adoption: January 2, 2011
For further information, please call: (512) 305-6900

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 7. RAIL FACILITIES

The Texas Department of Transportation (department) proposes the repeal of §7.1, Definitions; amendments to §7.10, Definitions, §7.11, Comprehensive Development Agreements, §7.12, Construction and Maintenance Contracts; the repeal of §7.13, Leasing of Rail Facilities; new §7.13, Contracts with Rail Operators and Leases; amendments to §7.20, Definitions, §7.21, Abandonment of Rail Line by Rural Rail Transportation District, §7.22, Acquisition of Abandoned Rail Facilities, §7.30, Definitions, §7.31, Safety Requirements, §7.32, Filing Requirements, §7.33, Reports of Accidents/Incidents, §7.34, Hazardous Materials--Telephonic Reports of Incidents, §7.35, Hazardous Materials--Written Reports, §7.36, Clearances of Structures Over and Alongside Railway Tracks, §7.37, Visual Obstructions at Public Grade Crossings, §7.38, Wayside Detector Map, List, or Chart, §7.39, Right To Inspect Railroad Property, §7.40, Enforcement of Safety Requirements, §7.41, Rail Safety Program Fee, and §7.42, Administrative Review, all concerning rail facilities.

EXPLANATION OF PROPOSED AMENDMENTS, REPEAL, AND NEW SECTION

The department is amending its rules related to rail facilities to correct statutory citations and to make nonsubstantive changes. Additionally, there are several substantive changes related to contracting with rail operators and leasing.

Section 7.1, Definitions, which contains the definitions of "commission" and "department," is repealed. These terms are defined in each of the subchapters of Chapter 7, so this section is repealed because its provisions are redundant of other provisions in the chapter and therefore, unnecessary.

Amendments to §7.10, Definitions, remove the definitions of terms that are not used in the subchapter.

Amendments to §7.11, Comprehensive Development Agreements, corrects a reference to the heading of 43 TAC Chapter 27, Subchapter A.

Amendments to §7.12, Construction and Maintenance Contracts, remove subsection (a) because the subsection merely

repeated statutory language, which is not needed. Further, while the subsection included a reference to requirements for a contract with a rail operator, the commission believes for the purpose of clarity, such requirements should be in another section, §7.13. The subsequent subsections are relettered. The amendments also correct the reference to the §9.15 heading title.

Section 7.13, Leasing of Rail Facilities, is repealed and replaced with new §7.13, Contracts with Rail Operators and Leases. This section provides that the department may contract with a public or private entity to operate or lease a rail facility acquired or constructed by the department. The department must use a competitive process to select the operator or lessee. For the selection of a rail operator, Transportation Code, §91.051 directs the contract be awarded to the lowest responsible bidder that complies with the department's criteria. For the selection of a lessee, the contract will be awarded to the bidder whose proposal offers the apparent best value to the department. The apparent best value standard is the same standard as used by the department to select the bidder for a comprehensive development agreement. When the department seeks an operator or lessee the department must publish a request for proposals and evaluate the proposals based on specified criteria. The department will rank the proposals and attempt to negotiate an agreement with the highest ranked proposer. The executive director will submit a summary of the agreement's terms to the Texas Transportation Commission (commission), and the commission may authorize the agreement's execution if it finds the agreement to be in the best interest of the state and furthers state, regional, and local transportation plans, programs, policies, and goals. The department is not required to use a competitive process when it contracts for rail operator services for 90 days or less, when it contracts with a public entity, or when it leases railroad track that connects to only one railroad line.

The new section retains most of the existing language but clarifies that the department will use a competitive process for both contracts with rail operators and leases, because they may be separate types of contracts. It also adds provisions that except the department from the competitive process requirements for certain types of contracts. Engaging in a competitive process with a rail operator for a period of less than 90 days would unduly hinder the department's ability to hire operators for short periods of time. Additionally, Transportation Code, §§91.051, 91.052, and 91.102 exempt the department from competitive bidding requirements when contracting with public entities. Finally, when the department devotes rail resources in a region for a narrow purpose, for example, for the purpose of economic development or safety, it may use its resources to develop a segment and lease it to the adjacent railroad without competition.

Amendments to §7.20, Definitions, remove the definitions of terms that are not used in the subchapter.

Amendments to §7.21, Abandonment of Rail Line by Rural Rail Transportation District, correct a statutory citation and provide an address for the director of the Rail Division. The amendments also clarify the time for submitting an application for abandonment and the contents of that application to ensure districts understand the timeline and necessary documentation.

Amendments to §7.22, Acquisition of Abandoned Rail Facilities, clarify that the department may acquire abandoned rail facilities from a rural rail transportation district and remove redundant wording.

Amendments to §7.30, Definitions, add a definition for the term "department" and change the definition of "division director" to reflect the shift of the responsibility for rail safety from the department's Transportation and Programming Division to the Rail Division.

Amendments to §7.31, Safety Requirements, correct statutory citations and add new federal railroad safety requirements to the list of minimum railroad safety requirements for the state.

Amendments to §7.32, Filing Requirements, correct statutory citations and add new federal filing requirements to the list of items a railroad must file with the department upon request. The amendments also provide a railroad with the option of filing with the department the telephone numbers of either the railroad dispatcher or a supervisor rather than limiting the requirement to the number of the dispatcher. The amendments state that the department prefers that filings be made in electronic digital media format.

Amendments to §7.33, Reports of Accidents/Incidents, replace a reference to the Transportation Planning and Programming Division with a reference to the Rail Division. Additionally, the amendments specify that the department prefers that railroads electronically file copies of Federal Railroad Administration reports requested by the department.

Amendments to §7.34, Hazardous Materials--Telephonic Reports of Incidents, replace a reference to the Transportation Planning and Programming Division with a reference to the Rail Division.

Amendments to §7.35, Hazardous Materials--Written Reports, clarify the contents of a report a railroad must file listing types and classifications of hazardous materials.

Amendments to §7.36, Clearance of Structures Over and Alongside Railway Tracks, replaces existing language with a concise statement of the Texas Clearance Law (Texas Civil Statutes, Articles 6559a-6559f). A clear space is required to 22 feet above the top of the rails, and 8-1/2 feet from the center line of a railroad track. The changes remove references to provisions the department believes are archaic and no longer used by railroads. The amendments also correct statutory citations.

Amendments to §7.37, Visual Obstructions at Public Grade Crossings, add new definitions for "active warning device," and "passive public grade crossing," for the purpose of clarity. The section concerns preventing visual obstructions, namely standing equipment on the track, vegetation, and permanent structures.

Amendments to §7.38, Wayside Detector, Map, List, or Chart, replace a reference to the Transportation Planning and Programming Division with a reference to the Rail Division.

Amendments to §7.39, Right To Inspect Railroad Property, provide that the department has the authority to inspect railroad facilities equipment, records, and operations relating to the packaging, loading, unloading, or transportation of hazardous materials in accordance with Transportation Code §111.102. Vernon's Civil Statutes Article 6448b, which previously assigned this inspection authority to the Railroad Commission, was codified as Transportation Code §111.102. Section 111.102 transferred this authority to the department.

Amendments to §7.40, Enforcement of Safety Requirements, correct a statutory citation. The amendments clarify that a violation of any Federal Railroad Administration safety requirement

may be the subject of enforcement. The amendments also remove the deadlines regarding timeliness of Federal Railroad Administration enforcement action. The provisions that describe timely action have not been used and so have been deleted.

Amendments to §7.41, Rail Safety Program Fee, specify that "interchanged" refers to the transfer of rail cars between railroads. Additionally, the amendments clarify that annual reports submitted to the department will be verified as to their accuracy.

Amendments to §7.42, Administrative Review, replace a reference to the Transportation Planning and Programming Division with a reference to the Rail Division and adds an address for the department.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each year of the first five years the amendments, repeal, and new section as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments, repeal, and new section.

Bill Glavin, Director, Rail Division has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments, repeal, and new section.

PUBLIC BENEFIT AND COST

Mr. Glavin has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments, repeal, and new section will be greater clarity and organization and eliminating obsolete provisions in the department's rules. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed repeal of §7.1; amendments to §§7.10 - 7.12; the repeal of §7.13 and new §7.13; and amendments to §§7.20 - 7.22 and §§7.30 - 7.42 may be submitted to Bill Glavin, Director, Rail Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on January 3, 2011.

SUBCHAPTER A. GENERAL PROVISIONS

43 TAC §7.1

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Department of Transportation or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

STATUTORY AUTHORITY

The repeal is proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §91.003, which provides the commission with the authority to adopt rules to implement Transportation Code, Chapter 91, relating to rail facilities, and Transportation Code, §111.101, which authorizes the commission to adopt rules to implement federal safety laws.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 91 and Chapter 111, Subchapter C.

§7.1. Definitions.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 19, 2010.

TRD-201006607
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: January 2, 2011
For further information, please call: (512) 463-8683

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SUBCHAPTER B. CONTRACTS

43 TAC §§7.10 - 7.13

STATUTORY AUTHORITY

The amendments and new section are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §91.003, which provides the commission with the authority to adopt rules to implement Transportation Code, Chapter 91, relating to rail facilities, and Transportation Code, §111.101, which authorizes the commission to adopt rules to implement federal safety laws.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 91 and Chapter 111, Subchapter C.

§7.10. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

~~[(1) Abandoned rail facilities--Rail facilities for which:]~~

~~[(A) a notice of intent to abandon or discontinue service has been filed with the Surface Transportation Board under 49 C.F.R. §1152.20;]~~

~~[(B) an application for abandonment or discontinuance of service has been filed with the Surface Transportation Board under 49 C.F.R. Part 1152; or]~~

~~[(C) abandonment or discontinuance of service has been authorized by the Surface Transportation Board.]~~

(1) [~~(2)~~] Commission--The Texas Transportation Commission.

(2) [~~(3)~~] Department--The Texas Department of Transportation.

~~[(4) Director--The director of the department's Transportation Planning and Programming Division.]~~

~~[(5) District--A rural rail transportation district created under Texas Civil Statutes, Article 6550c.]~~

(3) [~~(6)~~] Executive Director--The executive director of the department or the executive director's designee not below the level of division director.

[~~(7) Federal application--An application for abandonment of a rail line filed with the Surface Transportation Board under 49 C.F.R. Part 1152, Subpart C.~~]

[~~(8) Notice--The notice of intent to file an abandonment application described in 49 C.F.R. §1152.20.~~]

(4) [~~(9)~~] Public entity--A governmental entity, including a political subdivision of this state, that is authorized by law to operate rail facilities.

(5) [~~(10)~~] Rail facility--Real or personal property, or any interest in that property, that is determined to be necessary or convenient for the provision of a freight or passenger rail facility or system, including commuter rail, intercity rail, and high-speed rail.

[~~(11) Service performed on the rail line--The number of trains operated on the line and their frequency, and the total tonnage and carloads on the line.~~]

[~~(12) State funds--Funds provided by this state or an agency of this state for the purpose of acquiring or operating a rail line.~~]

§7.11. Comprehensive Development Agreements.

(a) To the extent and in the manner that the department may enter into a comprehensive development agreement with respect to a turnpike or toll project under Chapter 27, Subchapter A of this title (relating to Comprehensive Development Agreements [~~Policy, Rules, and Procedures for Private Involvement in Department Turnpike Projects~~]), the department may enter into a comprehensive development agreement for the financing, design, acquisition, construction, maintenance, or operation of a rail facility or system.

(b) The department shall utilize the processes and procedures provided in Chapter 27, Subchapter A of this title when considering the use of a comprehensive development agreement, including when:

(1) requesting qualifications and proposals or accepting unsolicited proposals for the financing, design, acquisition, construction, maintenance, or operation of a rail facility or system;

(2) evaluating and ranking submissions and proposals; and

(3) selecting the proposal that provides the best value to the department.

(c) The department may combine in a comprehensive development agreement a rail facility or system and a turnpike or toll project as defined in Transportation Code, §201.001.

(d) In this section, "rail facility" and "system" have the meanings assigned in Transportation Code, Chapter 91.

§7.12. Construction and Maintenance Contracts.

[~~(a) Transportation Code, §91.051, provides that except for a contract entered into under §§91.052, 91.054 or 91.102, a contract made by the department for the construction, maintenance, or operation of a rail facility must be let by a competitive bidding procedure in which the contract is awarded to the lowest responsible bidder who complies with the department's requirements.~~]

(a) [~~(b)~~] The department shall comply with the policies and procedures prescribed in Chapter 9, Subchapter B of this title (relating to Highway Improvement Contracts) in the qualification of bidders, issuance of proposals and receipt of bids, and award and execution of a contract for the construction or maintenance of a rail facility.

(b) [~~(c)~~] The name and address of the individual to whom bids shall be submitted will be provided when a project is advertised. That individual will be responsible for opening and reading bids in accordance with the policies and procedures in §9.15 of this title (relating to Acceptance, Rejection, and Reading of Bids [~~Proposals~~]).

(c) [~~(d)~~] Bidder responsibility requirements shall be provided by the department with the proposal form issued for a project.

(d) [~~(e)~~] A construction or maintenance contract may provide for partial payments and retainage in the amounts provided in the contract.

(e) [~~(f)~~] Architectural, engineering, or surveying services that are needed for the construction or maintenance of a rail facility shall be acquired in accordance with the requirements of Government Code, Chapter 2254, and Chapter 9, Subchapter C of this title (relating to Contracting for Architectural, Engineering, and Surveying Services), except that the administrative qualification requirements of §9.42 of this title (relating to Administrative Qualification) shall not apply if the department does not have a precertification category for the work to be performed.

§7.13. Contracts with Rail Operators and Leases.

(a) For any rail facility acquired or constructed by the department, the department may contract with a public or private entity to operate the facility or lease it.

(b) Except as provided in this section, the department will use a competitive process to select the operator or lessee. For the selection of a rail operator, the department will select the lowest responsible bidder that complies with the department's criteria. For the selection of a lessee, the department will select the bidder whose proposal offers the apparent best value to the department. The department will publish a notice in the *Texas Register* and in a newspaper of general circulation in the area in which the rail facility is located, requesting proposals to operate or to lease the facility. In evaluating proposals submitted in response to a request under this subsection, the department will select the bidder considering the:

(1) qualifications and capability of the proposer to operate the rail facility;

(2) proposer's experience in constructing and maintaining rail facilities;

(3) financial capability of the proposer to operate and maintain the rail facility;

(4) relative effectiveness of the proposer's management team and staff;

(5) extent to which the proposal minimizes the department's financial obligations in acquiring or maintaining the rail facility;

(6) if within the scope of the published proposal, proposer's plan for maintaining and improving equipment, trackwork, and right of way, including the planned schedule for carrying out the maintenance and improvements and planned funding sources; and

(7) if within the scope of the published proposal, proposer's planned operating rules and procedures for servicing markets served by the rail facility, including plans and proposed schedules for improving service and adding additional markets.

(c) The department will rank all proposals submitted in response to a request under subsection (b) of this section using the criteria set out in the request for proposals. The criteria will, at a minimum, include the factors listed in subsection (b) of this section. The department will negotiate an agreement with the highest ranked proposer.

(d) If an agreement satisfactory to the department cannot be negotiated with the proposer, the department will formally end negotiations with that proposer. The department may reject all proposals or proceed to the next highest ranked proposal and attempt to negotiate an agreement with that proposer.

(e) The executive director will submit to the commission a summary of the final terms of the agreement. The commission may authorize the executive director to execute the agreement if it finds that the agreement is in the best interest of the state and furthers state, regional, and local transportation plans, programs, policies, and goals.

(f) The department may enter into the following contracts without engaging in a competitive process:

(1) a contract for rail operator services for 90 days or less, if the department first contacts at least three responsible operators;

(2) a contract with a public entity; or

(3) a lease of railroad track that connects to only one railroad line.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 19, 2010.

TRD-201006609
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: January 2, 2011
For further information, please call: (512) 463-8683

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43 TAC §7.13

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Department of Transportation or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

STATUTORY AUTHORITY

The repeal is proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §91.003, which provides the commission with the authority to adopt rules to implement Transportation Code, Chapter 91, relating to rail facilities, and Transportation Code, §111.101, which authorizes the commission to adopt rules to implement federal safety laws.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 91 and Chapter 111, Subchapter C.

§7.13. Leasing of Rail Facilities.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 19, 2010.

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Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: January 2, 2011
For further information, please call: (512) 463-8683

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SUBCHAPTER C. ABANDONED RAIL

43 TAC §§7.20 - 7.22

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §91.003, which provides the commission with the authority to adopt rules to implement Transportation Code, Chapter 91, relating to rail facilities, and Transportation Code, §111.101, which authorizes the commission to adopt rules to implement federal safety laws.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 91 and Chapter 111, Subchapter C.

§7.20. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Abandoned rail facilities--Rail facilities for which:

(A) a notice of intent to abandon or discontinue service has been filed with the Surface Transportation Board under 49 C.F.R. §1152.20;

(B) an application for abandonment or discontinuance of service has been filed with the Surface Transportation Board under 49 C.F.R. Part 1152; or

(C) abandonment or discontinuance of service has been authorized by the Surface Transportation Board.

(2) Commission--The Texas Transportation Commission.

(3) Department--The Texas Department of Transportation.

~~[(4) Director--The director of the department's Transportation Planning and Programming Division.]~~

~~[(5) District--A rural rail transportation district created under Texas Civil Statutes, Article 6550c.]~~

~~[(6) Federal application--An application for abandonment of a rail line filed with the Surface Transportation Board under 49 C.F.R. Part 1152, Subpart C.]~~

(4) [~~(7)~~] Notice of intent--The notice of intent to file an abandonment application described in 49 C.F.R. §1152.20.

(5) [~~(8)~~] Rail facility--Real or personal property, or any interest in that property, that is determined to be necessary or convenient for the provision of a freight or passenger rail facility or system, including commuter rail, intercity rail, and high-speed rail.

(6) [~~(9)~~] Service performed on the rail line--The number of trains operated on the line and their frequency, and the total tonnage and carloads on the line.

(7) [~~(10)~~] State funds--Funds provided by this state or an agency of this state for the purpose of acquiring or operating a rail line.

§7.21. Abandonment of Rail Line by Rural Rail Transportation District.

(a) Purpose. Transportation Code, §172.210, [~~Texas Civil Statutes, Article 6550c, §5(r)~~] provides that a rural rail transportation district created under that chapter [~~article~~] may not abandon a rail line of the district with respect to which state funds have been loaned or granted unless the abandonment is approved by the commission [~~Texas Transportation Commission~~] as being consistent with the policies of that chapter [~~article~~]. This section prescribes the policies and procedures by which a rural rail transportation district may apply for and obtain approval to abandon a rail line of the district.

(b) Application.

(1) To request approval of the abandonment of a segment of rail line with respect to which state funds have been loaned or granted, a district shall submit an application to: Director, Rail Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701 [~~the director~~].

(2) An application shall be submitted to the department no later than 45 days after the district filed the notice of intent [~~filing of a notice~~] under 49 C.F.R. §1152.20 and shall include a copy of:

(A) documentation under which the district obtained state funds for the rail line;

(B) the notice of intent filed with the Surface Transportation Board [~~relating to the rail line~~];

(C) the [~~federal~~] application filed with the Surface Transportation Board under 49 C.F.R. Part 1152, Subpart C [~~relating to the rail line~~]; and

(D) documentation evidencing compliance with the requirements of 49 C.F.R. §1152.20.

(c) Public Hearing.

(1) If the department finds that the application meets the requirements of subsection (b) of this section, it will notify the district of its findings and will conduct one or more public hearings to receive public comment on the proposed abandonment.

(2) The department will hold at least one hearing within at least one of the counties of the district.

(3) The department will file a notice of each hearing with the Secretary of the State for publication in the *Texas Register.*

(4) The district shall advertise each hearing in accordance with an outreach plan developed in consultation with the department.

(d) Approval. In approving a request to abandon a segment of rail line, the commission will consider:

(1) service performed on the line in the two years preceding the date of the notice of intent;

(2) comments or other evidence of support of or opposition to the proposed abandonment received from interested parties;

(3) alternate sources of transportation services available, including alternate sources of rail transportation service;

(4) impact of the proposed abandonment on the operation of the state transportation system;

(5) impact of the proposed abandonment on communities served by the rail line; and

(6) viability of the rail line for continued rail transportation service.

(e) Limitation. Abandonment of a rail line is subject to Surface Transportation Board permission pursuant to federal law.

§7.22. Acquisition of Abandoned Rail Facilities.

(a) Purpose. Transportation Code, Chapter 91, authorizes the department to acquire abandoned rail facilities. In establishing criteria for the department's acquisition of abandoned rail facilities, the commission is required to consider the local and regional economic benefit realized from the disbursement of funds in comparison to the amount of the disbursement. This section prescribes policies and procedures for the department's acquisition of abandoned rail facilities.

(b) Public involvement.

(1) On receipt of a notice of intent to abandon or discontinue service, the department shall coordinate with the governing body of any municipality, county, or rural rail transportation district in which all or a segment of the rail facility is located to determine whether:

(A) the department should acquire the rail facility [~~to which the notice relates~~]; or

(B) any other actions should be taken to provide for continued rail transportation service.

(2) The department shall request that a municipality, county, or district in which all or a segment of the rail facility is located provide documentation concerning the local and regional economic impact of an abandonment or discontinuance of service.

(3) If the department determines that there is a need to preserve the rail facility for continued rail service, or to preserve the corridor for another public-use condition under 49 C.F.R. §1152.28, it will notify the municipalities, counties, or districts in which all or a segment of the rail facility is located, and will conduct one or more public hearings to receive public comment on the proposed acquisition.

(4) In making a determination under subsection (c) of this section, the department will consider:

(A) information contained in the notice of intent to abandon or discontinue service and any application for abandonment or discontinuance of service filed with the Surface Transportation Board with respect to that rail facility under 49 C.F.R. Part 1152, including the extent of any service performed on the rail line; and

(B) information provided by a municipality, county, or district concerning the economic impact of an abandonment or discontinuance of service.

(5) The department will hold at least one public hearing within at least one of the counties in which the rail facility is located and will file a notice of each hearing with the Secretary of the State for publication in the *Texas Register.*

(c) Criteria. In approving the acquisition of an abandoned rail facility, the commission will consider:

(1) service performed on the rail line in the two years preceding the date of the notice of intent to abandon or discontinue service;

(2) comments or other evidence in support of or opposition to the proposed abandonment or discontinuance of service received from interested parties;

(3) alternate sources of transportation services available, including alternate sources of rail transportation service;

(4) impact of the proposed abandonment or discontinuance of service on the operation of the state transportation system;

(5) local and regional economic impact of the abandonment or discontinuance of service;

(6) viability of the rail line for continued rail transportation service; and

(7) the extent to which the monetary value of the economic benefits attributable to the acquisition exceed the amount of funds disbursed by the department to acquire the rail facility.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 19, 2010.

TRD-201006610
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: January 2, 2011
For further information, please call: (512) 463-8683

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SUBCHAPTER D. RAIL SAFETY

43 TAC §§7.30 - 7.42

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §91.003, which provides the commission with the authority to adopt rules to implement Transportation Code, Chapter 91, relating to rail facilities, and Transportation Code, §111.101, which authorizes the commission to adopt rules to implement federal safety laws.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 91 and Chapter 111, Subchapter C.

§7.30. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Department--The Texas Department of Transportation.

(2) [~~(1)~~] Division director--The [~~the~~] director of the department's Rail [~~Transportation Planning and Programming~~] Division.

(3) [~~(2)~~] FRA--The Federal Railroad Administration.

(4) [~~(3)~~] Railroad--Any [~~any~~] form of nonhighway ground transportation that runs on rails or electromagnetic guideways.

(A) Railroad includes:

(i) commuter or other short-haul railroad passenger service in a metropolitan or suburban area; and

(ii) high speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads.[~~;~~]

(B) Railroad does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

§7.31. Safety Requirements.

(a) Applicability. A person, association, private corporation, public corporation, or any other entity that owns or operates a railroad shall comply with the requirements of this subchapter.

(b) Governing statutes. Railroads operating within the state of Texas shall comply with the safety requirements contained in or adopted under the following statutes:

(1) 49 United States Code, Subtitle III, Chapter 51 [~~§§5101, et seq~~];

(2) 49 United States Code, Subtitle V, Part A [~~§§20101, et seq.~~];

(3) Transportation Code, Chapter 111 [~~Texas Civil Statutes, Article 6448a~~]; and

(4) Texas Civil Statutes, Article 6492a.

(c) Federal regulations adopted by reference. The following federal railroad safety requirements, as they exist on the effective date of this rule, are adopted by the department as the minimum railroad safety requirements, and all railroads operating within the state of Texas shall comply with them:

(1) transportation workplace drug testing programs, codified at 49 C.F.R. [~~Code of Federal Regulations,~~] Part 40;

(2) hazardous materials regulations, codified at 49 C.F.R. [~~Code of Federal Regulations,~~] Parts 107 and 171-180 [~~171-179~~];

(3) track safety standards, codified at 49 C.F.R. [~~Code of Federal Regulations,~~] Part 213;

(4) railroad workplace safety [~~bridge worker safety~~] standards, codified at 49 C.F.R. [~~Code of Federal Regulations,~~] Part 214;

(5) freight car safety standards, codified at 49 C.F.R. [~~Code of Federal Regulations,~~] Part 215;

(6) special notice and emergency order procedures, codified at 49 C.F.R. [~~Code of Federal Regulations,~~] Part 216;

(7) federal operating practice regulations, codified at 49 C.F.R. [~~Code of Federal Regulations,~~] Parts 217, 218, 220, 221, 225, and 228;

(8) control of alcohol and drug use, codified at 49 C.F.R. [~~Code of Federal Regulations,~~] Part 219;

(9) locomotive horns at public highway-rail crossings regulations, codified at 49 C.F.R. [~~Code of Federal Regulations,~~] Part 222;

(10) safety glazing standards, codified at 49 C.F.R. [~~Code of Federal Regulations,~~] Part 223;

(11) reflectorization of rail freight rolling stock regulations, codified at 49 C.F.R. [~~Code of Federal Regulations,~~] Part 224;

(12) occupational noise exposure, codified at 49 C.F.R. Part 227;

(13) [~~(12)~~] locomotive safety standards, codified at 49 C.F.R. [~~Code of Federal Regulations,~~] Part 229;

(14) [~~(13)~~] steam locomotive inspection and maintenance standards regulations, codified at 49 C.F.R. [~~Code of Federal Regulations,~~] Part 230;

(15) [~~(14)~~] safety appliance standards, codified at 49 C.F.R. [~~Code of Federal Regulations,~~] Part 231;

(16) [~~(15)~~] power brake standards, codified at 49 C.F.R. [~~Code of Federal Regulations,~~] Part 232;

(17) signal system reporting requirements, codified at 49 C.F.R. Part 233;

(18) grade crossing signal system safety, codified at 49 C.F.R. Part 234;

(19) instructions governing applications for approval of a discontinuance or material modification of a signal system or relief from the requirements of 49 C.F.R. Part 236, codified at 49 C.F.R. Part 235;

(20) [~~(16)~~] rules, standards, and instructions for railroad signal systems, codified at 49 C.F.R. [~~Code of Federal Regulations,~~] Part 236;

(21) bridge safety standards, codified at 49 C.F.R. Part 237;

(22) [~~(17)~~] passenger equipment safety standards regulations, codified at 49 C.F.R. [~~Code of Federal Regulations,~~] Part 238;

(23) [~~(18)~~] passenger train emergency preparedness regulations, codified at 49 C.F.R. [~~Code of Federal Regulations,~~] Part 239; and

(24) [~~(19)~~] qualifications and certification of locomotive engineers, codified at 49 C.F.R. [~~Code of Federal Regulations,~~] Part 240.

§7.32. Filing Requirements.

(a) A railroad shall file with the department:

(1) the name, address, and telephone number of the principal operating officer in Texas;

(2) a primary and secondary telephone number, which are manned 24 hours per day, for the railroad dispatcher or supervisor responsible for train operations in Texas.[~~;~~]

(b) When the department makes a written request, a railroad shall file with the department:

(1) its code of operating rules, timetables, and timetable special instructions as follows:

(A) the operating rules, timetables, and timetable special instructions; and

(B) each amendment to the railroad's code of operating rules, each new timetable, and each new timetable special instruction;

(2) a copy of monthly reports of excess service filed with the FRA under 49 C.F.R. §228.19;

(3) a copy of its program for periodic conduct of operational tests and inspections filed with the FRA under 49 C.F.R. §217.9; [~~and~~]

(4) a copy of its program for periodic instruction of its employees filed with the FRA under 49 C.F.R. §217.11; and [~~.~~]

(5) a copy of its program for engineer certification filed with the FRA under 49 C.F.R. Part 240.

(c) Filings required by subsection (b)(1) - (5) [~~(b)(1) - (4)~~] of this section may include only information pertaining to railroad operations conducted in the state of Texas.

(d) It is preferred that filings required by this subsection be made using electronic digital media format.

(e) [~~(d)~~] Filings required by this section shall be submitted to: Rail [~~Multimodal Section, Transportation Planning and Programming~~] Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2423 [~~P.O. Box 149217, Austin, Texas 78714-9217~~].

§7.33. Reports of Accidents/Incidents.

(a) Telephonic reports of certain accidents/incidents.

(1) A railroad shall give immediate telephonic notice to the department of accidents/incidents and other events by calling the department's Rail [~~Transportation Planning and Programming~~] Division at (800) 440-0376. Except as provided in paragraph (2) of this subsection, a railroad shall give reports to the department in the same manner and following the same requirements as the railroad shall give reports to the National Response Center under 49 C.F.R. §225.9.

(2) In addition to giving the department telephonic notice of the accidents/incidents and other events described in 49 C.F.R. §225.9, a railroad shall give telephonic notice of accidents/incidents which:

(A) result in the death of one or more persons;

(B) result in the injury of two or more persons;

(C) involve a fire or explosion; or

(D) involve a passenger or commuter train.

(b) Written reports. When the department makes a written request, a railroad shall furnish the department with a copy of an accident/incident report filed with the FRA under 49 C.F.R. Part 225, within 30 days after expiration of the month during which the accident/incident occurred. Only copies of reports that concern accidents/incidents occurring in the state of Texas shall be filed with the department. It is preferred that filings required by this section be made by electronic digital media format.

§7.34. Hazardous Materials - [~~--~~]Telephonic Reports of Incidents.

A railroad shall give immediate telephonic notice to the department of hazardous materials incidents by calling the department's Rail [~~Transportation Planning and Programming~~] Division at (800) 440-0376. A [~~Except as provided in the succeeding sentence, a~~] railroad shall give reports to the department in the same manner and following the same requirements as the railroad shall give reports to the National Response Center under 49 C.F.R. §171.15. A railroad shall give telephonic notice of only those accidents/incidents which involve the operation of railroad on-track equipment (standing or moving).

§7.35. Hazardous Materials - [~~--~~]Written Reports.

(a) Policy. It is the policy of the department to provide information regarding the type and quantity of hazardous materials transported within the state to local emergency planning agencies in areas containing reported railroad operations. It is also department policy to collect such information in order for the department to more efficiently allocate hazardous materials inspection resources. To accomplish these policies, each railroad that transports a hazardous material through the state is required to adhere to certain reporting requirements relating to the transportation of hazardous materials.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Emergency management program--An emergency management program established under Government Code, Chapter 418, Subchapter E.

(2) Hazardous material--Any substance transported by a railroad which is included within the requirements of the railcar placarding regulations adopted by the United States Department of Transportation and published in the C.F.R. [~~Code of Federal Regulations~~], Title 49.

(3) Railroad line segment--A length of railroad line over which hazardous materials are transported between two or more munic-

ipalities within the state that are also identified as stations on a current railroad timetable. A line segment will terminate at the nearest municipality where the frequency of cars-per-year transporting hazardous materials changes from one category, as defined in subsection (d)(2) of this section, to another.

(4) Reporting year--Calendar year (January 1-December 31) preceding the year the report is to be submitted.

(c) Reporting requirements. A railroad that transports hazardous materials in or through the state is required to file the following information with the department:[.]

(1) when [When] the department makes a written request, a copy of the report of each hazardous materials incident occurring within the state of Texas that the railroad company files with the Unites States Department of Transportation under 49 C.F.R. §171.16;

(2) a map delineating the geographical limits of the railroad operating divisions or districts and the principal operating officer for the railroad in each operating division or district in the state;

(3) a primary and secondary telephone number, which are manned 24 hours per day, for the railroad dispatcher responsible for train operations in each operating division or district in the state;

(4) the name and address of the railroad employee in charge of managing hazardous materials transportation for the railroad; and

(5) a report that satisfies subsection (d) of this section and that shows [list of] each type of hazardous material [(sorted by hazard class and quantity)] transported over each railroad line segment owned, leased, or operated by the railroad in the state during the reporting year.

(d) Contents of report. [Type of hazardous material.]

(1) The type of hazardous material transported shall be identified by hazard class as defined by 49 C.F.R. [Code of Federal Regulations,] Part 173, or 40 C.F.R. [Code of Federal Regulations,] Part 261.

(2) The quantity of hazardous materials transported shall be classified into the following five categories depending on the number of shipments of hazardous materials transported in a year:

(A) more than 10,000 cars-per-year;

(B) 5,001 to 10,000 cars-per-year;

(C) 1,001 to 5,000 cars-per-year;

(D) 501 to 1,000 cars-per-year;

(E) 51 to 500 cars-per-year;

(F) one to 50 cars-per-year.

(3) Texas counties traversed by each railroad line segment shall be identified.

(4) The applicable railroad operating division or district shall be identified for each railroad line segment. A railroad line segment shall not traverse more than one railroad operating division or district.

(e) Reporting dates. Reports required by subsection (c)(2) - (5) of this section shall be filed with the department not later than April 1 of each year.

(f) Forms. Reporting shall be made [on a form or a copy] as prescribed by the department.

(g) Variance. A railroad may request that the department grant a variance from the requirements of this section. The department shall process the application in accordance with §7.42 of this subchapter (relating to Administrative Review). The department may approve the variance only if the department will continue to receive information concerning the transportation of hazardous materials needed by local emergency planning agencies and needed to efficiently allocate the department's inspection resources. Any exception granted by the department shall be valid for a period not to exceed two years.

§7.36. Clearances of Structures Over and Alongside Railway Tracks.

(a) The lowest part of a structure built over the tracks of a railroad, including a bridge, viaduct, foot bridge, or power line, may not be less than 22 feet above the top of the rails of the tracks.

(b) A structure, including a platform or fence, or material may not be built or placed so that any part of the structure or material is less than 8-1/2 feet from the center line of a railroad track, including a main line, spur, switch, or siding.

(c) The lowest part of a roof projection constructed for any purpose may not be less than 22 feet above the top of the rails of a railroad track and the horizontal edge of the roof projection may not be less than 8-1/2 feet from the center line of the track.

[(a) Mail cranes, turn tables, cattle guards, icing racks and coal chutes. Mail cranes, turn tables, cattle guards, icing racks, and coal chutes are exempt from provisions of the Texas Clearance Law, Texas Civil Statutes, Article 6559(a)-(f).]

[(b) Water cranes and oil cranes. Present standards for water cranes and oil cranes may be maintained, provided there is a minimum clearance of seven feet from the center line of the track.]

[(c) Through truss and girder bridges.]

[(1) The minimum horizontal clearance in bridges shall be seven feet six inches from the center line of the track, over a distance between a point four feet above the top of the rail and a point 17 feet above the top of the rail.]

[(2) Upper diagonal bracing in bridges shall not encroach within a line extending from a point seven feet six inches from the center line of the track at a height of 17 feet above the top of the rail to a point three feet from the center line of the track, at a height of 22 feet above the top of the rail.]

[(3) Lower diagonal bracing in bridges and walkway railings on bridges shall not encroach within a line extending from a point seven feet six inches outside of the center line of the track at a height of four feet above the top of the rail to a point five feet nine inches outside of the center line of the track at the top of the rail elevation.]

[(d) Switch stands interlocking plants.]

[(1) A switch stand or dwarf signal shall have a minimum horizontal clearance of five feet six inches from the center of the track, for the area two feet six inches or less above the top of the rail.]

[(2) Interlocking apparatus not exceeding six inches above the top of the rail shall have a minimum horizontal clearance of four feet from the center of the track.]

[(e) Passenger train sheds and platform. Passenger train sheds where only passenger equipment is handled are exempt from the requirements of this section. The minimum horizontal clearance between the center line of the track and the passenger station platform, one foot or less in height above the top of the rail, shall be four feet six inches.]

(d) [(f)] [Round house and shop building doors.] The provisions of the Texas Clearance Law, Texas Civil Statutes, Articles 6559a-6559f [Article 6559(a)-(f)], shall not apply to engine houses or buildings into which locomotives or cars are moved for terminal inspection, attention, or repairs.

[(g) Stock yards and loading chutes. Minimum horizontal clearance for stock yards and loading chutes shall be six feet six inches, except where such structures are constructed on main line tracks.]

(e) [(h)] Variance. A railroad may apply for a variance from the requirements of [one or both,] the Texas Clearance Law, Texas Civil Statutes, Articles 6559a-6559f [Art. 6559(a)-(f)], or this section, on a form to be prescribed by the department. The department shall process the application in accordance with §7.42 of this subchapter (relating to Administrative Review). The department may approve an application, provided there remains adequate protection for the safety of people and equipment. The department may require appropriate measures such as posting warning signs and giving notice to railroads that use the facility.

§7.37. Visual Obstructions at Public Grade Crossings.

(a) Definitions. The following words or terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Active warning device--A bell, flashing light, gate, wigwag, or other automatically activated warning device that provides an active warning to a motorist of the approach of a train to the crossing.

(2) [(1)] Passive [Unprotected] public grade crossing--A crossing or intersection of railroad track by a publicly maintained road or highway at which the traffic control devices consist entirely of signs or pavement markings and there are no active warning [electronic] devices [(such as flashers or gates) to provide an active warning to a motorist of the approach of a train to the crossing].

(3) [(2)] Vegetation--Grass, bushes, shrubbery, and trees having a trunk diameter of six inches or less.

(b) Standing equipment. No railroad shall cause or allow trains, railway cars, or equipment to stand less than 250 feet from the centerline of any passive [unprotected] public grade crossing unless a closer distance cannot be avoided.

(c) Vegetation. A [At unprotected public grade crossings, each] railroad shall control vegetation on its right-of-way (except for the roadbed and areas immediately adjacent to the roadbed) for a distance of 250 feet each way from the centerline of a passive public grade crossing [the crossings], so that vegetation does not block the vehicular highway traffic's view of approaching trains. The 250 feet shall be measured from the point where the centerline of the railroad crosses the centerline of the public road. Where the right-of-way is fenced, this subsection shall be deemed complied with if vegetation is controlled up to two feet from the fence.

(d) Permanent structures. A [At unprotected public grade crossings, each] railroad shall keep its right-of-way clear of unnecessary permanent obstructions, such as billboards and signs that are not authorized by the railroad and that are not required for the safe operation of the railroad, for a distance of 250 feet each way from a passive public grade crossing [the crossing] so that the obstructions do not block the vehicular highway traffic's view of approaching trains. Billboards and signs that are legally permitted by the state or a political subdivision are not unnecessary permanent obstructions, so long as they do not block the vehicular highway traffic's view of approaching trains. Permanent buildings, such as warehouses and equipment facilities, which existed prior to June 26, 1986, are exempt from the requirements of this subsection. The 250 feet shall be measured from the point where the centerline of the railroad crosses the centerline of the public road.

(e) Variance. A railroad may apply for a variance from the requirements of subsections (c) and (d) of this section on a form to be prescribed by the department. The department shall process the application in accordance with §7.42 of this subchapter (relating to Administrative Review). The department may approve an application, provided there remains a clear line-of-site adequate to provide for the safe passage of vehicles. The department may require appropriate measures such as posting warning signs and giving notice to railroads that use the facility.

§7.38. Wayside Detector Map, List, or Chart.

(a) When the department requests in writing, a railroad shall file a map, list, or chart with the department indicating the current locations within the state of Texas of the following wayside detectors:

(1) hot box indicators;

(2) dragging equipment detectors;

(3) high water indicators;

(4) shifted load detectors; and

(5) other wayside detectors.

(b) Filings required by this section shall be submitted to: Rail [Multimodal Section, Transportation Planning and Programming] Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2423 [P.O. Box 149217, Austin, Texas 78714-9217].

§7.39. Right to [To] Inspect [Railroad Property].

(a) Railroad property. Authorized personnel of the department shall have the right to enter onto the property of any railroad operating within the state of Texas, for the purpose of conducting inspections, investigations, and surveillance of railroad tracks, facilities, equipment, records, and operations in order to determine the railroad's compliance with relevant safety requirements. Any inspection, investigation, or surveillance shall be conducted at a reasonable time and in a reasonable manner.

(b) Hazardous materials. In accordance with Transportation Code, §111.102, authorized personnel of the department have the right to inspect facilities, equipment, records, and operations relating to the packaging, loading, unloading, or transportation of hazardous materials by railroad.

§7.40. Enforcement of Safety Requirements.

(a) Federal enforcement action. The division director may refer violations of FRA's railroad safety requirements [adopted under §7.31 of this subchapter (relating to Railroad Safety Requirements)] to the FRA with a recommendation that the FRA seek either imposition of civil penalties or an injunction against further railroad safety violations, or both.

(b) State enforcement action. The department may, through the attorney general of Texas, bring an action in any court of competent jurisdiction and proper venue, seeking either imposition of a civil penalty or an injunction, or both, against violation of a railroad safety regulation or order issued under the provisions of the Texas Civil Statutes[, Article 6448a] or Transportation Code, Chapter 111. The department may also, through the attorney general of Texas, bring an action in the United States district court for the judicial district in which the violation occurred or in which the defendant has its principal executive office, seeking either imposition of a civil penalty or an injunction, or both, for a violation of FRA's railroad safety requirements [a railroad safety requirement adopted under the provisions of §7.31 of this subchapter], if the division director has requested such action and the FRA has failed to take timely action on a request. [FRA action on a request that it seek to impose a civil penalty is timely if, within 60 days after receipt of the request, FRA has either assessed a civil penalty or determined, in writing, that no violation has occurred. FRA action on a request that it seek an injunction against further violation of a rail

~~safety requirement is timely if, within 15 days after receipt of the request, the FRA has referred the matter to the United States attorney general for institution of litigation, has undertaken other enforcement action, or has determined, in writing, that no violation has occurred.~~]

§7.41. Rail Safety Program Fee.

(a) Annual fee. Each railroad operating within the state shall pay an annual fee as provided by this section.

(b) Definitions. The following terms, when used in this section, shall have the following meanings unless the context clearly indicates otherwise.

(1) Gross ton miles:

(A) the combined weight of all rail cars and their contents, exclusive of locomotives, multiplied by the number of miles traveled in the state within a calendar year; or

(B) if a railroad has reported its calendar year gross ton miles on a Form R-1 filed with the United States Surface Transportation Board (USSTB), that portion of the reported gross ton miles that are for operations within the state.

(2) Rail cars interchanged [~~Interchanged~~]--rail cars that are transferred from one railroad to another.

(c) Annual report of gross ton miles. Each railroad operating within the state that is required to report its gross ton miles to the USSTB, shall report to the department, no later than July 1 of each calendar year, the railroad's gross ton miles for the preceding calendar year. The report shall be in writing, signed by a duly authorized officer of the railroad, and verified as to accuracy.

(d) Annual report of rail cars interchanged. Each railroad operating within the state that is not required to report its gross ton miles to the USSTB, shall report to the department, no later than July 1 of each calendar year, the railroad's total number of rail cars interchanged for the preceding calendar year. The report shall be in writing, signed by a duly authorized officer of the railroad, and verified as to accuracy.

(e) Calculation of fee. The department shall determine the annual fee for each railroad operating in the state as follows:

(1) for each railroad that is required to report its gross ton miles to the department:

(A) each railroad's gross ton miles will be divided by the total gross ton miles of all railroads required to report gross ton miles to the department; and

(B) the result will be multiplied by 95% of the amount estimated by the department to be necessary to recover the costs of administering the department's rail safety program for the next state fiscal year;

(2) for each railroad that is required to report its total rail cars interchanged to the department:

(A) each railroad's total number of rail cars interchanged will be divided by the total number of rail cars interchanged by all railroads required to report rail car interchanges to the department; and

(B) the result will be multiplied by 5% of the amount estimated by the department to be necessary to recover the costs of administering the department's rail safety program for the next state fiscal year.

(f) Notice of fee due. The department shall, no later than September 1 of each calendar year, notify each railroad operating in the state of the amount of that railroad's fee that is due and payable.

(g) Payment of fee. Each railroad operating in the state shall, no later than November 1 of each calendar year, pay its assessed fee to the department. The payment shall be made payable to the state of Texas and shall be considered by the department to be timely made if it is received by the department on or before November 1 of the same calendar year in which notice has been given under subsection (f) of this section, or is sent to the department by first-class United States mail in an envelope properly addressed, stamped, and postmarked on or before November 1 of the same calendar year in which notice has been given under subsection (f) of this section, and received by the department not more than 10 days later. A legible postmark affixed by the United States Postal Service shall be prima facie evidence of the date of mailing.

(h) Determination of gross ton miles, total rail cars interchanged. The following requirements apply to railroad reports.

(1) If a railroad does not timely report its gross ton miles as required by subsection (c) of this section, the department may make a good-faith estimate of the railroad's gross ton miles and assess the railroad's fee based on that estimate. Failure by a railroad to timely report its gross ton miles constitutes a waiver by the railroad to object to both the department's estimate and the fee based on the estimate.

(2) If a railroad does not timely report its total rail cars interchanged as required by subsection (d) of this section, the department may make a good-faith estimate of the railroad's total cars interchanged and assess the railroad's fee based on that estimate. Failure by a railroad to timely report its total cars interchanged constitutes a waiver by the railroad to object to both the department's estimate and the fee based on the estimate.

(3) If the department has a rational basis for questioning the gross ton miles or the total rail cars interchanged reported by a railroad, the department may, by letter, fax, or electronic mail, request the railroad provide documentation or other evidence demonstrating how the railroad determined its reported gross ton miles or its reported total rail cars interchanged. The request shall state the department's rational basis for questioning the reported gross ton miles or the reported total rail cars interchanged and shall inform the railroad that it may deliver such documentation or evidence to the department by hand delivery, mail, fax, electronic mail, or private carrier.

(4) If the department determines that a railroad has not provided sufficient documentation or other evidence within 14 calendar days of the request, the department may, in the case of a railroad required to report its gross ton miles, proceed under paragraph (1) of this subsection as if the railroad did not timely report its gross ton miles or, in the case of a railroad required to report its total rail cars interchanged, proceed under paragraph (2) of this subsection as if the railroad did not timely report its total rail cars interchanged. The department shall inform a railroad whether it accepts the railroad's documentation or evidence or whether it is proceeding under paragraph (1) or (2) of this subsection.

(i) Administrative review. A railroad may apply for administrative review of the department's determination under subsection (h)(3) and (4) of this section in accordance with §7.42 of this subchapter (relating to Administrative Review).

§7.42. Administrative Review.

(a) Applicability. This section applies only when another section makes a specific reference to this section.

(b) Application.

(1) A railroad shall submit an application for administrative review to the following address: Director, Rail [~~Transportation Planning and Programming~~] Division, Texas Department of Trans-

portation, 125 East 11th Street, Austin, Texas 78701-2423 [~~P.O. Box 149217, Austin, Texas 78714-9217~~].

(2) The application shall explain the relief requested, all relevant facts, and the legal basis for the relief sought.

(3) If the application seeks review of a department decision given to the railroad in writing, the railroad shall submit an application for review no later than 30 days after receipt of the written decision.

(c) Decision. The executive director, or his designee not below division director, shall decide whether to grant, grant in part, or deny the application. If an applicant does not provide information sufficient to evaluate the application, the application shall be denied. The applicant is not entitled to a contested case hearing, and there is no right to appeal the decision.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 19, 2010.

TRD-201006611
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: January 2, 2011
For further information, please call: (512) 463-8683

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CHAPTER 21. RIGHT OF WAY

The Texas Department of Transportation (department) proposes repealing existing 43 TAC Chapter 21, Subchapter I, Regulation of Signs along Interstate and Primary Highways, §§21.141 - 21.163, and Subchapter K, Control of Signs along Rural Roads, §§21.401, 21.411, 21.421, 21.431, 21.441, 21.451, 21.461, 21.471, 21.481, 21.491, 21.501, 21.511, 21.521, 21.531, 21.541, 21.542, 21.551, 21.561, 21.571, 21.572, and 21.581. The department proposes the simultaneous replacement of the repealed subchapters with new Subchapter I, Regulation of Signs along Interstate and Primary Highways, §§21.141 - 21.203; Subchapter J, Regulation of Electronic Signs, §§21.251 - 21.260; Subchapter K, Control of Signs along Rural Roads, §§21.401 - 21.446; and Subchapter Q, Regulation of Directional Signs, §§21.941 - 21.947.

EXPLANATION OF PROPOSED REPEALS AND NEW SECTIONS

The department is in the process of restructuring the Outdoor Advertising Program. To achieve this goal the department has determined that changes to the existing rule format are necessary. To streamline this process the department is proposing to repeal the rules relating to the existing program and simultaneously propose new sections. A majority of the new rules are nonsubstantive changes. The department proposes a new rule organizational structure that subdivides the current rules into smaller sections and reorganizes them so that the new rules logically follow the sign permitting process. The revision permits easier location of and access to specific provisions and makes them more understandable.

In addition, the department has made substantive changes to the rules to address four specific areas: fee structure, streamlining current regulations, methods to increase consistency between the primary and rural road programs, and methods to improve consistent enforcement. The department requested input from interested parties on these four issues and any other suggestions on improving existing rules to help formulate these new rules. Several comments were received and used in drafting these revisions.

The Texas Transportation Commission (commission) also appointed a rulemaking advisory committee. Members of the Outdoor Advertising Rulemaking Advisory Committee represent the regulated industry, local political subdivisions, land owners, and scenic organizations. The views from the committee were diverse and provided the necessary input for the department to formulate the rule revisions. The committee focused on the rule revisions with substantive changes and provided advice and guidance for the language included in these rules.

In this preamble, the abbreviation "OAS" is used for "outdoor advertising signs."

New §21.141, Purpose, contains the purpose and scope of the subchapter and is the same as the current §21.141.

New §21.142, Definitions, incorporates a majority of the definitions from the current §21.142 without change. The definitions for "commercial or industrial area," "zoned commercial or industrial area," "unzoned commercial or industrial area," and "commercial or industrial activity" have been moved to separate sections because they provided substantive language regarding the qualifications for a sign permit. This change makes the language easier to understand and find. The new section also changes the definitions of "freeway" by adding toll roads, "intersection" by referencing the statutory definition, and "interstate highway system" by more clearly defining which roadways qualify. Additional grammatical changes were made in this section to clarify the provisions and remove unnecessary language.

New §21.143, Permit Required, is primarily the language of the current §21.146(b), but now provides an unambiguous identification of the type of OAS for which a permit is required. The language is altered from the current rule to provide that if any of the advertisement or information content is visible from the main travel lanes of a regulated highway the OAS is required to have a permit unless otherwise exempted under the chapter.

New §21.144, License Required, provides that a person must hold as outdoor advertisement license to obtain a permit for an OAS. This language is the same as the first part of the current §21.149(a)(1) with minor grammatical changes. There are no substantive changes to the requirement for the OAS license.

New §21.145, Prohibited Signs, provides specific circumstances under which a sign is prohibited and ineligible for an OAS permit under the subchapter. This language was taken from current §21.148 with the addition of the reference to signs prohibited under Transportation Code, §391.252. This reference was added so that the statutory prohibitions would not be overlooked if a licensee or another individual were tempted to rely only on the rules for guidance.

New §21.146, Exempt Signs, is a revision of the current §21.147 and provides descriptions of signs that are exempt from the permitting requirements of the subchapter. This new section provides a detailed listing of the requirements of each type of exempted sign including size, restrictions of location and time of posting if applicable, and content of the sign. This language is needed for clarification. The new section exempts a recorded

subdivision's permanent entrance sign that only identifies the subdivision. The new language also allows exempt ranch or farm signs to include the telephone number and Internet website information of the ranch or farm to address current technology trends. New language also requires that an on-premise sign be erected no sooner than one year before the business is open in order to maintain exempt status. This change is needed to clarify that, although the business does not have to be open at the time the sign is installed, the opening must be forthcoming.

New §21.147, On-premise Sign, provides the requirements for a sign to qualify as an on-premise sign, for which a permit is not required under the subchapter. The language is substantially the same as current §21.147(b). The new section expands the information that can be displayed on an on-premise sign to include telephone number and the Internet address of the business. New parts of the section require that a sign that advertises the sale or lease of real property on which the sign is located must be removed within 90 days after the date of the transfer of ownership or execution of the lease. This limitation prevents a real estate agent or entity from using such a sign as a means of advertisement for the agent or entity. The new language provides a working definition of "date of closing" a sales or lease transaction to clarify the time that a real estate sign can be posted. Finally, current rules limit an incidental trademark or logo to less than 50 percent of the sign face. With the emergence of electronic on-premise signs this clarification is necessary to allow for the rotation of images. The new rule requires the name of the business be displayed 50 percent of the time in any five minute interval.

New §21.148, Exception to License Requirements for Nonprofit Signs, is substantially the same language as current §21.149(g). The section provides that a nonprofit organization does not have to obtain an OAS license, but must obtain a permit under new §21.149.

New §21.149, Nonprofit Sign Permit, provides a separate permitting process for nonprofit signs. The new section expands the listing of nonprofit organizations in current §21.147(a)(5) to include a service club, charitable association, religious organization, chamber of commerce, nonprofit museum, or governmental entity. These additions provide more guidance and reflect the current policy of the types of entities that qualify for nonprofit signs. New language also provides for an expanded message to include information pertaining to the meeting, services, events, or location of the nonprofit entity. The department believes that a separate permitting process for nonprofit signs will help clarify the differences between these specific types of signs and general advertising OAS signs.

New §21.150, Continuance of Nonconforming Signs, is one part of a four section revision of current §21.143. This new section deals with the specifics of the renewal of a permit for a nonconforming sign and provides clear statements as to the standards with which a nonconforming sign must comply. The language provides that to be eligible for a permit renewal, the nonconforming sign must have been lawful on the date it was erected or came under the control of the department and must remain substantially the same as it was on that date. The new section is taken from current §21.143(a) with minor nonsubstantive changes.

New §21.151, Time Proposed Roadway Becomes Subject to Subchapter, clarifies that a proposed roadway becomes subject to the rules of the subchapter when the environmental clearance and the approved alignment have been obtained from the Federal Highway Administration. If FHWA approval is not needed, the road comes under the chapter when the alignment is approved by the governmental entity responsible for the construction of the roadway. This new section provides a specific point in time in which a roadway becomes subject to these rules. This change is needed to prevent signs from being erected without complying with the permitting requirements. The current language regarding when the road becomes subject to the rules is in the current definitions of freeway and interchange in §21.142(9) and (10).

New §21.152, License Application, provides the application process for an OAS license. This language incorporates the language of current §21.149(a). The new section provides for the specifics of applying for an OAS license including the information that must be included in the application, the statutory requirement of a surety bond in the amount of $2,500 for each county in which the applicant's signs are to be erected or maintained, and the requirement of the license fee. The surety bond is payable to the commission to reimburse the department for removal costs of a sign that the license holder unlawfully erects or maintains. The language regarding the information that must be contained in the surety document in the current rule is not included in this new section because the requirement that the document must be in a form prescribed by the department is sufficient to provide the department with all necessary information to determine if the surety meets the minimum requirements. Other than the deleted language regarding the surety form the new language has only minor grammatical changes from the current §21.149(a).

New §21.153, License Issuance, stipulates that the department will issue a license if the requirements of new §21.152 are satisfied. The new section states that the department may not issue a license to a business entity that is not authorized to conduct business in this state. This differs in wording from the current §21.149(a)(3) which refers to a corporation or limited partnership that is "authorized by the secretary of state to conduct business in the State of Texas."

New §21.154, License Not Transferable, states that a license issued under the subchapter is not transferable. This is a rewording of current §21.149(a)(4).

New §21.155, License Renewals, retains the requirement for annual renewal of an OAS license stated in current §21.149(b)(1). The new section provides for the renewal of all licenses on the date of expiration, which will increase administrative efficiency from a special listing of licenses in current §21.149(b)(1)(B) and (C), which required a renewal date of January 1st of each succeeding year if the original license was issued after January 1, 1991. The requirements for the annual renewal in the new section state that the applicant must file a written application in a form prescribed by the department accompanied by the annual renewal fee listed in new §21.156. Further, the new section requires the minimal compliance for the renewal application to be the license holder's complete legal name, mailing address, telephone number, number of licenses being renewed, proof of bond coverage, signature of the license holder or person signing on behalf of the business entity, and any additional information the department considers necessary. Lastly, the new section states that a license is not eligible for renewal if the license holder is not authorized to conduct business in this state. The renewal points of compliance in the new section differ from the current §21.149(b)(2) - (4) only in the correction of grammar. Language is also added to allow a 30-day grace period for renewals with

the payment of an additional late fee. The department will not accept a renewal if received more than 30 days after the license expires.

New §21.156, License Fees, and Transportation Code, §391.069 and §394.025, provide that the department may charge fees in an amount that will recover the costs of enforcing the program. Research indicates the current fee structure for the original license application and the annual license renewal has remained unchanged since December 2, 1991 and does not support a revenue neutral program that is in substantial need of modernization in inventory and enforcement procedures paramount to federal compliance issues. To create and maintain an inventory and needed enforcement, the new section sets the original license application fee at $125, and increases the current renewal fee from $60 to $75. The appropriate fee must be submitted with the application and is payable by check, cashier's check, or money order to the Texas Highway Beautification Fund. A license is voidable if the check or money order used to pay the fee is dishonored. New verbiage requires the renewing applicant to pay a late penalty of an additional $100 for late payment up to 30 calendar days after the date of termination of the license, which is established as one year from its last issuance. A payment or late payment received by the department after this 30 day late penalty period will not be honored and the license will be subject to revocation. The rules also provide that the department will give notification of the pending expiration at least 30 days before the expiration and will provide notice of the opportunity to file a late renewal. The 30 day grace period was added to prevent the harsh penalty of license revocation for being late on a payment.

New §21.157, Temporary Suspension of License, provides the process for the temporary suspension of an OAS license if the department is notified by a surety company that a bond is being canceled. The new section provides that the department will notify the license holder and that a new bond must be obtained and filed with the department before the bond cancellation date or the 30th day after the day of the receipt of the notice, whichever is later. This new section is primarily a rewording of current §21.149(d) with the additional statement that the notice under this section will be presumed to be received on the fifth day after the mailing.

New §21.158, License Revocation, provides that the department will revoke a license and in a restatement of §21.149(d) will not issue any permits or transfer existing permits under the license if the surety bond is not provided in the proper period, the surety bond is terminated, the license holder has not responded to previous enforcement actions, or the license holder has violations under the subchapter, new Subchapter J, or Transportation Code, Chapter 391, in combination, on more than 10 percent of the number of the license holder's valid permits. The department will send notice of the revocation clearly stating the reasons for the action, the effective date of the action, and the right and procedures for the license holder to request an administrative hearing. The format of the notice is a rewording of current §21.149(f)(1). The new section also restates current §21.149(f)(2) but provides 20 days to request an administrative hearing instead of the current 10 days. The language also now states that the notice is presumed to be received five days after mailing. The 20-day period in the new section provides additional time for a business entity to determine whether to request a hearing. The new section restates current §21.149(f)(3) by providing that the administrative hearings will be conducted in accordance with 43 TAC Chapter 1, Subchapter E, Procedures in Contested Case. The rule is changed to require 10 percent of violations to correspond with the seriousness of the penalty. The department has the ability to go after the individual permits for specific violations and believes that a license should be revoked only if the license holder is showing a disregard for the rules evidenced by multiple violations. Ten percent was selected because the department feels that it is significant enough to show a problem for the sign owner.

New §21.159, Permit Applications, addresses the permit application process. Current §21.150 contains all aspects of the permit process from eligibility through conversions of permits. The new section adds clarity and ease of understanding by dividing current §21.150 into separate functional processes beginning with new §21.159, which includes restatements of requirements for obtaining a permit that are primarily the same requirements found in current §21.150(b). These requirements include submitting an application on a form prescribed by the department with the information from current §21.150(b), such as name and address of the applicant, the applicant's signature, the proposed location and description of the sign, the legal name and address of the owner of the designated site and verification of the nonprofit status of the applicant if applicable.

New §21.159 strengthens minimal application requirements by stating that the applicant must provide written evidence in the form of the signature of the site owner or site owner's representative consenting to the erection of the sign and providing the department right of entry onto the property at the sign location. The new section also provides that if the sign is to be located within the jurisdiction of a municipality that is exercising its authority to regulate outdoor advertising, a certified copy of the permit issued by the municipality must be submitted with the application. That provision is similar to the current §21.150(b)(3). The copy is not required if the city requires a state permit prior to issuing the city permit or the city requires the sign to be erected within one year. The rule also requires the signatures to be originals to eliminate a problem with photo copied signatures submitted on multiple applications. The changes are needed to improve the quality of the information the department receives and to improve the application process.

Additional strengthening of minimal permit application requirements in §21.159 include having the application notarized, requiring a sketch that shows the location of the sign structure support poles, and providing the exact location of the sign faces in relation to the sign structure, the means of access to the sign, the distance from buildings, landmarks, right of way line, other signs, and distinguishable features of the landscape. All of these requirements help the department review the applications in a timely manner.

New §21.160, Applicant's Identification of Proposed Site, requires the applicant to identify the location of the proposed sign structure by setting a stake or marking the concrete at the proposed location. The new section adds language regarding marking a concrete location to address the situation in which the proposed location is in an area that cannot be marked by a stake. Other than the additional language regarding concrete markings, only minor grammatical and formatting changes were made from the language of current §21.150(b)(6).

New §21.161, Withdrawal of Site Owner's Consent, restates the portion of current §21.150(b)(2) addressing the withdrawal of a site owner's consent to allow an OAS on the property. The restatement includes language that the site owner's consent operates for the life of the lease or until the site owner delivers a

written statement to the department that the consent has been withdrawn in accordance with the terms of the lease agreement or through a court order. The land owner must also notify the sign owner that the consent has been withdrawn. This notice demonstrates to the department that all parties are aware of the issue. The new section strengthens language over the current rule by including the site owner's consent to include erection and maintenance of the sign and access to the site for inspection by the department or its agents. In addition, the new section adds that if the sign owner is disputing the lease termination in court, the sign owner must provide documentation establishing that fact for the department to stay cancellation proceedings. Requiring documentation enables the department to verify that the dispute is being addressed.

New §21.162, Permit Application for Certain Preexisting Signs, provides that the owner of an existing sign that becomes subject to Transportation Code, Chapter 391, because of a new highway or a change in a highway's designation must apply for a permit within 60 days after notification by the department. This revises current §21.150(n) which requires a permit application to be filed within 30 days. The department has provided the additional 30 days to provide the sign owner ample time to submit the application before the department initiates an enforcement action. In addition, the department will send notification to the sign owner by certified mail to ensure receipt and to have a specific date for any enforcement actions.

New §21.163, Permit Application Review, restates current §21.150(c) indicating permit applications will be considered in the order of their receipt and if the application is incomplete or incorrect, it will lose its priority position. If during the review process of the application another application for the same site or a conflicting site is received, that application will be held until a final decision on the previously received application is final. The department will notify the applicant that the application is being held. The new section specifies when a decision on an application is final to avoid confusion of when the department will consider a subsequent application for the same or a conflicting sign location. The new section adds language identifying the review process to include a review of the application document and a site inspection that will include verification of measurements for compliance with spacing and locations requirements.

New §21.164, Decision on Application, provides that in both the approval and denial of a permit application, the department will send a copy of the approved or denied application to the applicant within 45 days of receipt of the application. If the decision cannot be made within 45 days the department will notify the applicant of the delay and provide an estimate for when the decision will be made. This will ensure that the department continues to maintain a focus on reviewing applications. In the case of approval, a sign permit plate will be included with the copy, and in the case of denial, a written notice stating the reason for denial will be included. The new section eliminates unnecessary language in the portion of current §21.150(b)(5) relating to the notice of an approved application. The rule also contains new language requiring the department to notify the land owner of an application denial. The land owner has no standing to contest the decision unless land owner is also the sign owner. The notice is purely informational so that the land owner is aware of the status of the application.

New §21.165, Sign Permit Plate, is a revision of current §21.150(b)(5) and (f). The new section provides direction for placement of the sign permit plate on the sign structure and expands the language to require that if a permit plate becomes lost, stolen, or illegible, the sign owner must complete a department form for the replacement along with a replacement fee. New wording strengthens the visibility requirement that the sign permit plate be visible from the main-traveled way at all times. The new section incorporates a revision of current §21.150(i)(11) by stating that failure to apply for a replacement plate within 60 days of notification or fail to attach in conformance with the applicable requirements may result in the cancellation of the permit.

New §21.166, Sign Location Requirements, provides that a permit will not be issued for an OAS unless it is located along a roadway subject to Transportation Code, Chapter 391 within a zoned or unzoned commercial or industrial area. The new section has minor grammatical changes from current §21.150(b)(4).

New §21.167, Erection and Maintenance from Private Property, provides that a permit will not be issued for an OAS unless the sign can be both erected and maintained from private property. This is a restatement with minor rewording of current §21.161(a) and strengthens current §21.161(b) by changing "erected or maintained" to "erected and maintained" from private property.

New §21.168, Conversion of Certain Authorization to Permit, provides language for the conversion of an off-premise OAS to a permit under the subchapter when a highway regulated under Transportation Code, Chapter 394 regarding rural roads becomes subject to Transportation Code, Chapter 391 related to regulated highways. A fee for the original application for a permit is not required and a sign permit plate will be issued at no charge. If the sign owner has prepaid registration fees under the rural roads rules, the outstanding balance will be credited to the sign owner's annual renewal fee. The new section makes additional grammatical changes, clarifies provisions, and removes unnecessary language from current §21.150(m).

New §21.169, Notice of Sign Becoming Subject to Regulation, provides notification that the owner of a sign that has become subject to Transportation Code, Chapter 391 must obtain an OAS license. The section provides that the department will send written notification by certified mail, or if the sign owner cannot be determined, the department will post the notice on the sign for 30 days. The sign owner will have 60 days to submit an OAS license application. This language adds grammatical changes, and clarifies and removes unnecessary language from current §21.150(n).

New §21.170, Appeal Process for Permit Denials, provides that if a permit application is denied, the applicant may file for an appeal with the executive director. The appeal must be in writing and contain a copy of the denied application, statements as to why the denial is believed to be in error, and supporting documentation for the appeal. The written appeal must be received by the department within 20 days after the date the denial notice was received by the applicant. The final determination will be sent to the applicant and will contain the reason for the denial of the appeal or a decision that the permit will be issued. The new section reenactments the basic language of current §21.162. However, the new section strengthens the language by providing a maximum period of 20 days in which the applicant may submit the appeal. The current rule was silent regarding the period for appeal. By providing a period to request an appeal the department is able to have a specific date that the denial is final if no appeal is requested. This allows the department to move forward on other permit applications for the same or conflicting locations. The rule also states that the department will make a decision on

the appeal within 90 days. If the department is unable to make a decision the department will notify the applicant of the delay. This language is needed to provide the sign owner some guidance on how long the appeal process with take.

New §21.171, Permit Expiration, provides that an OAS permit is valid for one year or automatically expires if the license under which the permit was issued expires, is revoked by the department, or if the sign is acquired by the state in the process of a transportation project. The new section is a reenactment of current §21.150(h) with minor grammatical changes and removal of unnecessary language.

New §21.172, Permit Renewals, provides that an OAS permit must be renewed before the date on which it expires and is eligible for renewal if the sign continues to meet all applicable requirements of new Subchapter I and Transportation Code, Chapter 391. The renewal must be filed on the department's renewal application form and be accompanied by the scheduled renewal fee. Eligibility for the annual renewal requires that the sign be erected before the anniversary of the date the original permit was issued. The new section provides a maximum of 30 days after the date of expiration in which a late renewal will be accepted by the department along with an additional late fee penalty. The department has not always been consistent through out the districts regarding the acceptance of late renewals. This additional grace period is provided so that the sign owner is alerted that there is a specific date after which the sign cannot be renewed. The new section rephrases current §21.150(d)(1) and adds a 30-day late period in which a late renewal application can be received.

New §21.173, Transfer of Permit, provides that with the written approval of the department, one or more OAS permits may be transferred from one business entity to another assuming both entities hold a valid OAS license and that the appropriate department forms are completed and are accompanied by a prescribed transfer fee. The ability to transfer permits extends from one nonprofit organization to another assuming the sign will be maintained as a nonprofit sign. A nonprofit organization is also allowed to convert a nonprofit permit to a regular permit if the transferee holds an OAS license for the county in which the sign is located. The department will not approve the transfer of a permit if cancellation of the permit is pending or has been abated awaiting the outcome of an administrative hearing. The section allows for a statewide transfer policy. Other than the statewide transfer policy the new section differs from current §21.150(e) only in grammatical changes and removal of unnecessary language.

New §21.174, Amended Permit, provides new language that strengthens the overall OAS permit process by allowing an applicant to submit an application to amend a permit to make changes to the illumination of a sign, configuration of a multiple faced sign, size of the face, or location of the sign, to make customary maintenance or substantial changes under new §21.191, or to change a static sign face to an electronic face. This new section will allow a degree of flexibility missing from the current rules without a loss of compliance control. Nonconforming signs are not eligible for an amended permit except to perform customary maintenance. The language allows the department to develop a form and require the information from the original application that is applicable to an amended permit. All the information required on an original application is not necessary to amend the permit and the department needs the flexibility to require only the information that is needed based on the reason for amending the permits. In addition, the section includes the same 45-day requirement as in §21.164.

New §21.175, Permit Fees, sets the permit application fee at $100 per sign permit (current fee is $96 per permit) and the annual renewal fee at $75 per sign permit (current fee is $40 per sign). The proposed rule also provides for a new type of application for an "amended permit" and sets the fee at $100. The fees do not change for the replacement plate set at $25, the transfer of a permit set at $25, the transfer of a non-profit permit that does not have a fee, or the non-profit sign permit set at $10. The new rules allow, in addition to the $75 annual fee, an additional late fee of $100 for the renewal of a permit that is received within 30 days after the permit's expiration date.

Transportation Code, §391.069 and §394.025 allow the department to recover the costs of enforcing the program. The current fee structure for OAS permits in §21.150(g)(1) has not changed since November 22, 1991. The existing fee schedule does not support a revenue neutral program. In addition, it does not allow for modernization in inventory and enforcement procedures to comply with federal law.

To create and maintain a statewide electronic inventory and produce enforcement results needed to maintain a modern, efficient, responsive program, new §21.175 increases the fees for permits and renewals. Obviously since 1991, administrative costs have increased as have the number of signs. Without rule changes to increase the license and permit fee structure, compliance with federal and state laws becomes impossible. With the inadequate funding the department has seen a reduction in inventory compliance which has led to a decrease in effective enforcement policies. Without an increase in the fees the department will have a difficult time improving the effectiveness of the program. Failure to meet the federal compliance requirements in areas adjacent to the interstate highway system and the primary highway system could lead to a reduction in federal-aid highway funds.

New §21.175 refers to the $10 fee for the original application for or annual renewal of a nonprofit sign permit, which is set by Transportation Code, §391.070.

New language in §21.175 requires the renewing applicant to pay a late penalty of an additional $100 per sign face for late payment up to 30 calendar days after the expiration date. A payment or late payment received by the department after the 30-day late period will not be honored and the permit will be subject to cancellation. This language was added to address the new language of §21.171 regarding the expiration of the permit. The fee was set at $100 to encourage sign owners to timely initiate the renewal process, and to offset costs for additional notices and monitoring the renewal process.

New §21.176, Cancellation of Permit, provides that a permit will be canceled if the sign is removed; not maintained in accordance with the subchapter or Transportation Code, Chapter 391; damaged beyond repair; abandoned; not built at the location described in the application; repaired or altered without obtaining an amended permit; built by an applicant who uses false information; located on property owned by a person who withdraws permission; erected, repaired, or maintained in violation of the rules on destruction of vegetation and access from the highway right of way; or does not have a permit plate properly attached. The department will provide written notification of the cancellation to the sign owner that includes the reason for the cancellation, the effective date of cancellation, and the procedures for and right

of the permit holder to request an administrative hearing. The written request for the hearing must be delivered to the department within 20 days after the date the notice of cancellation is received by the sign owner. The hearing will be conducted in accordance with rules for standard contested case procedures. These provisions are found in current §21.150(i). In addition to the current language, the new section expands the provisions to include violations leading to cancellation authority when the repair or alteration have been conducted without obtaining an amended permit as now required under §21.174. The new section also provides for a voluntary cancellation process. This allows a licensee to voluntarily cancel a permit by written notification to the department and eliminates the need for the department to follow the administrative hearing process. The rule also states that for building in the wrong location or a permit plate violation the department will provide notice and 60 days to correct the problem prior to initiating a cancellation. This also provides that the department will only initiate cancellations for the wrong location for signs erected after the effective date of these rules. The department has begun an extensive inventory and this safe harbor provision prevents the inventory from triggering multiple cancellation proceedings for mistakes that have gone unidentified by the department for many years. The rule also adds language that the department will notify the land owner of pending cancellations. The land owner has no standing to challenge the cancellation unless he is also the sign owner. However, the notification will advise the land owner of the pending action.

Of all compliance issues relating to the program, the identification of the land use and activity of the area being recognized as commercial or industrial is of paramount importance. New §21.177, Commercial or Industrial Area, clarifies that a commercial or industrial area can be either a zoned or unzoned area and references specific definitions for both zoned and unzoned commercial or industrial areas to be found in new §21.178 and §21.179.

New §21.178, Zoned Commercial or Industrial Area, contains the qualifications for a zoned commercial or industrial area. This is the language from current §21.142(33) with only minor changes. The section states that for the purposes of OAS locations, an area is not considered zoned commercial or industrial if the area is: (1) an area in which limited commercial or industrial activities incident to other primary land uses are allowed; (2) an area that is designated for and created primarily to allow outdoor advertising structures along a regulated highway; (3) an unrestricted area; or (4) a small parcel or narrow strip of land that cannot be put to ordinary commercial or industrial use and that is designated for a use classification that is different from and less restrictive than its surrounding area.

New §21.179, Unzoned Commercial or Industrial Area, provides guidance for sign location in areas that are not zoned by a local municipality. The proposed site for an OAS in an area that is not zoned must be located on the same side of the highway and within 800 feet of at least two adjacent recognized commercial or industrial activities that are not used predominately for residential purposes. The two commercial or industrial activities must be within 200 feet of the highway right of way and the permanent building in which the activity is conducted must be visible from the main-traveled way. To be considered adjacent, the two activities' regularly used buildings, parking lots, storage, or processing areas of the activities may not be separated by roads, streets, a vacant lot, or undeveloped area more than 50 feet wide. Two activities that occupy the same building qualify as adjacent activities if each activity has at least 400 square feet of floor space dedicated to that activity, are activities that are customarily allowed only in a zoned commercial or industrial area, are separated by a dividing wall constructed from floor to ceiling, have separate and independent access and separate and independent access to the restroom facilities, and can operate independently of one another and are owned by different individuals. In this scenario, two separate product lines offered by one business are not considered to be two activities. The criterion used to determine whether an area is not predominantly used for residential purposes is that not more than 50 percent of the area (when considered as a whole) is used for residential purposes. Roads and streets are considered to be used for residential purposes if residential property is located on both sides of the road or street. The area considered an unzoned commercial or industrial area is the total of actual or projected frontage of the commercial or industrial activities plus 800 feet on each of the roadway frontage to a depth of 660 feet. The length of an unzoned commercial or industrial area is measured from the outer edge of the regularly used building, parking lot, storage, or processing area of the activities and along or parallel to the edge of the highway pavement.

New §21.179 revises and combines certain language from current §21.142(31), the definition for unzoned commercial or industrial activity, and §21.144(a) and (b) regarding measurements for these types of areas. The new section corrects grammar and eliminates redundant and unnecessary language. The new section strengthens the requirements relating to the dividing wall between two activities occupying the same buildings, access to each activity and from each activity to restroom facilities, and the independent operation of the activities. These changes were needed to address interpretation problems with the current rule. The department wanted to clarify that the activities must actually be distinct from one another and not conducted by the same business. The requirement that there be a floor to ceiling wall will eliminate confusion caused by the current language of a dividing wall. The section also clarifies that the businesses must be capable of being independent. In addition, language was added to grandfather the permits issued under the previous rules. With the changes made to the rules, the current billboards might not be eligible. Providing the language to eliminate the need for previous permits to comply with the new restrictions will mean that this change does not create nonconforming signs. The prior signs will continue to be eligible for changes and full maintenance.

New §21.180, Commercial or Industrial Activity, provides the requirements for qualifying as a commercial or industrial activity. The section states that a commercial or industrial activity is an activity customarily allowed only in a zoned area and is conducted in a building or structure that has an indoor restroom, running water, functioning electrical connections, adequate heating, and permanent flooring, other than dirt, gravel, or sand, is visible from the traffic lanes of the main-traveled way, is not primarily used as a residence, has at least 400 square feet of its interior floor space devoted to the activity, and has been open for business for six months. The new section lists activities that are not considered to be commercial or industrial, including agricultural activities of various types, seasonal activities, the operation or maintenance of certain activities or structures, and activities created primarily or exclusively to qualify an area under §21.179. The new section revises language from current §21.142(2) by correcting grammar and the elimination of redundant and unnecessary language. The new section requires the business to employ at least one individual at the activity site for a minimum of 25

hours a week. The sections also require that the employee be at the site at least five days a week. The 25 hours can be spread over the five days in any manner as long as the hours are posted. This is a change from the current rule that required 30 hours a week or at least 5 days per week. Under the current rule a business could qualify if a person showed up at the business site for any amount of time as long as the person did it five days a week. This requirement was difficult for the department to observe and confirm compliance. In addition, the floor space requirement for the business was increased from 300 to 400 square feet and the length the business is open is increased to six months in an attempt to eliminate business created for the sole purpose on obtaining an OAS. The new language provides for a more enforceable standard and also helps to eliminate businesses created solely to have the site meet the requirements. The language of the section also deletes the requirement for a telephone to recognize the emergence of reliance on cellular technology. Language was added so that the new extended hours, the larger square footage, length of time the business must be open for business, and the square footage for residence portion will only affect the issuance of new permits. The department will not use the new requirements to change the status of a current sign.

New §21.181, Abandonment of Sign, provides that a sign is considered abandoned if it goes without advertising for 365 consecutive days or longer or if it needs to be repaired or is overgrown by trees or other vegetation. The department does not have to show that the sign has been without advertisement for each of the 365 days and can initiate the cancellation process if the department has evidence from four separate occasions that supports that conclusion. Small temporary signs, such as garage sale or campaign signs, located on private property that are attached to the structure do not constitute advertising for the purpose of these rules. Payment of property taxes or retention of a sign as a balance sheet asset will not be considered in determining whether a sign's permit will be canceled. If the location of an abandoned sign is conforming, a permit may be issued to anyone who submits an application that meets the requirements of the subchapter after cancellation of the prior permit is final. The new section restates current §21.156(b) while correcting grammar and removing unnecessary language. In addition, the new section strengths the current rule by expanding the specifics of the abandonment of a sign for 365 consecutive days by stating that the department can initiate the cancellation process without proof of abandonment for each of the 365 days. Other support, such as photographs of the sign on four separate occasions, can be used to make the determination of the sign being abandoned. The new section also deletes language stating that a sign permit that has not been renewed may be considered abandoned. This language conflicted with current §21.150(j) which authorized the removal of a sign for which the permit has expired. Deleting this language clarifies that the department may move for removal of such a sign without using the cancellation process. In addition, the section now includes a requirement that the department will notify the sign owner before the cancellation and provide 60 days for the sign owner to correct the issue. This will create a more effective enforcement program. Under the current process the department initiates the cancellation procedures at the time of notification and has often dismissed or settled the case when the sign company begins to place advertising on the sign.

New §21.182, Sign Face Size and Positioning, provides for the maximum sign face size and the types of sign configurations. The size of a single face of a sign may not exceed 672 square feet, 25 feet in height, and 60 feet in length, including the border and trim. Temporary protrusions may be added to a sign provided that the protruding area does not exceed 20 percent of the sign face and the total sign face area, including the protrusions, does not exceed 807 square feet. Measurements of the area are taken by the smallest square, rectangle, triangle, circle, or combination that encompasses the entire sign face. Signs may have more than one face on a structure and may be placed back-to-back, side-by-side, stacked, or in "V" shape construction but not more than two faces may be presented in each direction. Two sign faces, facing the same direction, may not exceed the maximum sign face area when measured together. Two sign faces facing the same direction may be presented as one face as long as the size limitations are not exceeded. The determination of fees is based on each face of a sign. In the case of two sign faces covered to make one face, fees are based on the original number of two faces. The new section uses corrected grammar and removes unnecessary language in a restatement of current §21.152 as it relates to limits for size, number, direction of visibility, height, length, and temporary protrusions for sign faces. The new section removes current §21.182(g), which states that a sign may be permanently enlarged without a new permit by up to 10%, because this provision relies totally on self-reporting and provides errors in record management related to compliance with sign limitations.

New §21.183, Signs Prohibited at Certain Locations, provides that a sign may not be located in a place that creates a safety hazard. The new section is a restatement of current §21.153(a) with only minor grammatical changes.

New §21.184, Location of Signs Near Parks, provides that a sign may not be located within 1,500 feet of a public park that is adjacent to a regulated highway on either side of a nonfreeway primary system highway and on the side of a highway adjacent to the public park if the highway is on the interstate or freeway primary system. The new section is a restatement of current §21.153(b). The rule also adds a provision that provides that a separate measurement can be taken from a park that does not abut the highway. If a park does not abut the highway a sign cannot be within a 250 foot radius from the park. The measurement is taken from the center pole of the proposed sign structure.

New §21.185, Location of Signs Near Certain Facilities, provides location restrictions for intersections, interchanges, rest areas, entrance ramps, and exit ramps. A sign may not be erected outside of the incorporated city limits of a municipality in an area that is adjacent to or within 1,000 feet of these facilities. The new section clarifies current §21.153(c) in the language describing how the 1,000 feet limitation is measured perpendicular and along the highway right of way in relation to the distance from interchanges, intersection, rest areas, ramps and acceleration and deceleration lanes. The clarification includes identifying the distance measurements from interchanges and intersections to be from the point of widening at the intersection of the right of way of the intersecting roadways. For rest areas, ramps, and acceleration and deceleration lanes the measurements are taken from the point of pavement widening at the beginning of the entrance or exit ramp and from the point that the pavement widening ends at the conclusion of the entrance or exit ramp. Further, the new section identifies and clarifies the "area adjacent to" an interchange, intersection, rest area, ramp or acceleration and deceleration lane in which a sign cannot be erected.

New §21.186, Location of Signs Near Right of Way, provides that no part of the sign face may be within five feet of the highway

right of way. The new section revises current §21.153(h) and is different only in the deletion of unnecessary language.

New §21.187, Spacing of Signs, provides that signs on the same side of a regulated freeway and the freeway frontage roads outside of incorporated municipal boundaries may not be erected closer than 1,500 feet apart. A municipality's extraterritorial jurisdiction is not considered to be within it boundaries. On a nonfreeway primary system highway outside of incorporated municipal boundaries the spacing limitation is 750 feet apart and includes the areas of the extraterritorial jurisdiction. On a nonfreeway primary system highway within the boundaries of an incorporated municipality, the spacing limitation is further reduced to 300 feet apart and does not include the extraterritorial jurisdiction in which the spacing limitations would default to 750 feet. In all cases, the measurements between signs are taken along the highway right of way perpendicular to the center of the signs. The new section restates current §21.153(d), (e), and (f) but clarifies the spacing limitations to extraterritorial jurisdictions of incorporated municipal boundaries. The new section also includes an exception to spacing limitations between signs that are separated by buildings, natural surroundings, or other obstructions that cause only one sign located within the specified area to be visible at any one time, which is in current §21.153(g).

New §21.188, Wind Load Pressure, provides that an original application and an application for the renewal of an OAS must include a certification that the sign will withstand specific wind load pressure based on the size of the sign. The new section is a restatement of current §21.157 with only minor reorganization, grammatical changes, and removal of unnecessary language. The wind load pressure remains the same.

New §21.189, Sign Height Restrictions, provides that the maximum height of an OAS is 42.5 feet and is measured from the grade level of the centerline of the main-traveled way closest to the sign at a point perpendicular to the sign location. A roof sign with a solid face surface may not exceed 24 feet above the roof level. A roof sign with an open sign face in which the open area between individual letter or shapes is not less than 40 percent of the total gross area of the sign face may not at any point exceed 40 feet above the roof level. The lowest point of a projecting roof sign must be at least 14 feet above grade. The new section is basically a restatement of current §21.158 with grammatical changes and removal of unnecessary language. However, it does include a clarification that the frontage road is not the main traveled way of a controlled access highway. This clarification is needed to ensure that all parties understand the starting point for the measurement of height.

New §21.190, Lighting of and Movement on Signs, provides that a sign may not contain or be illuminated by flashing, intermittent, moving lights, or animated or scrolling displays except for public service information such as time, date, temperature, weather, or similar information. If lights are part of or used to illuminate a sign, they must be shielded, directed, and positioned from all parts of the traveled ways of a regulated highway and may not have an intensity or brilliance that would cause vision impairment of a driver on a regulated highway or interfere with the driver's operation of a vehicle. In addition, no more that four luminaries can be used per direction of the sign face or faces. The department has received numerous complaints regarding the lights of the sign and at this time the department has determined that four lights adequately illuminate a sign. Lights or illumination on a sign may not obscure or interfere with the effectiveness of an official traffic sign, device, or signal. The same limitations are applied to a temporary protrusion on a sign, except that it may be animated only if it does not create a safety hazard to the traveling public. Reflective paint or reflective disks may be used on a sign face only if they do not create the illusion of flashing or moving lights or cause an undue distraction to the traveling public. Neon lights may be used on sign faces only if the light does not flash and does not cause undue distraction and if the permit for the sign specifies that the sign is an illuminated sign. Electronic temporary protrusions that display alphabetical or numerical characters only are not prohibited as long as the display consists of a stationary image, does not change more than twice every 24 hours, and the change occurs within one minute. The department identifies this type of protrusion as being part of the sign face similar to a cut out or other design feature. The remaining new section is a restatement of current §21.154 with grammatical changes and removal of unnecessary language.

New §21.191, Repair and Maintenance, provides the process by which an OAS may be maintained and repaired. The new language breaks the section into three parts, routine maintenance, customary maintenance, and substantial changes. Routine maintenance allows for the replacement of minor parts as long as the parts' materials to be the same type as those being replaced and that the basic design or structure of the sign is not altered. It also addresses such issues as changing the advertising message, cleaning, painting, nailing, welding, or the replacement of nuts and bolts. Routine maintenance can be performed without an amended permit. Under customary maintenance a sign owner can change the sign face structure as long as using the same material, upgrade lighting to energy efficient lighting, add a catwalk, and replace half the poles in a 12 month period. These changes require an amended permit. They are basically the current rules regarding normal maintenance under §21.143(b) with the addition of upgrading the lighting and adding a catwalk. The use of energy efficient lighting regardless of whether there is an initial change in the casing used for the lighting is not considered a substantial change and is allowed for nonconforming signs. The department recognizes a benefit in allowing energy efficient lights on all billboards and providing the safety feature of a catwalk. Under substantial changes the sign owner can make major changes to the sign structure as long as the sign structure remains in compliance with all other requirements of the subchapter. These changes are the current language of §21.143(c). Substantial changes can only be performed on conforming signs and an amended permit is required to make the change. The amended permit eliminates the potential inequity of a sign owner loosing the site between the time an existing permit was canceled and a new permit was filed in order to comply with "substantial" changes in the current rule. The new section also excludes language in current §21.143(c)(1)(I) that classifies making repairs that exceed 60 percent of the cost to erect a new sign of the same type at the same location a substantial change. Determining the cost of the repairs that exceeded the 60 percent level requires a level of self-reporting and response that is burdensome to sign owners. Removing the language from the new section means that all "substantial" repairs and maintenance can be administratively handled by using the new amended permit application. This section also addresses a problem with continual maintenance and repair of nonconforming signs. Under the new section, nonconforming signs may only receive routine or customary maintenance. A nonconforming sign can obtain an amended permit to perform customary maintenance. This change will allow the department to monitor the maintenance and improve compliance with these provisions.

New §21.192, Permit for Relocation of Sign, allows the relocation of an OAS that is legally erected and maintained and that will be within the highway right of way as a result of a construction project. If the sign is completely located in the highway right of way, the relocation of the sign requires a new permit and departmental approval of the new relocation site, including the new sign site's compliance with all local codes, ordinances, and applicable laws. An amended permit will be used for the relocation of a sign if it will be partially located within the highway right of way as the result of a construction project. The new section restates current §21.160(c) making grammatical changes and removing unnecessary language. The new section revises and expands current §21.160(f) by correcting grammar, removing unnecessary language, and adding the use of an amended permit for signs that will only be partially located (otherwise known as a bisection) within the new right of way resulting from a construction project. Again, this change provides a more efficient and equitable means for sign owners to complete administrative documents for relocation and decreases the department's response time without lessening quality compliance control. The new rule also establishes a time frame in which the new application must be submitted. The current rules do not provide such a period and that failure has caused administrative problems because the department cannot close out the prior sign file. The rule sets the period at 18 months which can be extended an additional six months by written request. The department believes this is adequate time for the sign owner to determine a new location for the sign.

New §21.193, Location of Relocated Sign, provides the relaxed location provisions for a relocated sign. The new section expands on new §21.192 by specifying in detail the requirements of the actual location of the sign relocated as a result of a highway construction project. To receive a permit under the relocation provisions, the existing sign must first be relocated to an area perpendicular to the current sign location and the highway right of way line. The rule also provides a 50 foot variance on either side to accommodate terrain or other obstructions. If that location is not available the sign can be relocated to the remaining parcel of land in which the sign was situated before relocation. If neither of these locations is economically or physically feasible the sign can be relocated to any location that meets the provisions of the subsection that provide for relaxed spacing requirements. The 50 mile provision has been removed as it is not necessary to limit the location within 50 miles. The 50 miles was originally used as it relates to the reimbursement provisions. The sign owner can only be reimbursed for 50 miles of the move but the new rules allow the sign owner the opportunity to move the sign further in order to avoid condemnation. The sign may not be relocated to a place where it would cause a driver to be unduly distracted, obscure or interfere with the effectiveness of an official traffic sign, signal, or device, or a driver's view of approaching, merging, or intersecting traffic. A sign located along a regulated highway on an interstate or freeway primary system may not be relocated to a place that is within 500 feet of a public park, interchange, intersection at grade, rest area, ramp, or ramp's acceleration or deceleration lane. For relocation on a highway on the interstate or freeway primary system, the sign may not be closer than 500 feet to another permitted OAS on the same side of the highway. For a highway on the nonfreeway primary system and outside of the incorporated limits of a municipality, the sign may not be closer than 100 feet to another permitted sign on the same side of the highway or within five feet of any highway right of way line. After relocation, the sign must be within 800 feet of at least one recognized commercial or industrial activity about which it provides information and that is located on the same side of the highway. The spacing limitations for relocated signs do not apply to on-premise signs, directional signs, or official signs exempted from the Transportation Code. The new section revises current §21.160(b)(5) and (7) and the spacing limitations of §21.160(b)(8) with reorganization, grammatical corrections, and removal of unnecessary language, but it does not change the reduced spacing limitations for relocated signs. The rule also provides that a sign cannot be relocated from a primary road to a road subject to the rural road program, preventing the movement of the signs into rural areas.

New §21.194, Construction and Appearance of Relocated Sign, provides that a relocated sign must be constructed with the same number of poles and of the same type of materials as the existing sign. The number of sign faces and lighting may not exceed that of the existing sign. The size of each of the sign faces of a relocated sign visible to approaching traffic may not exceed the smaller of the size of the existing sign face or an area of 1,200 square feet, a height of 25 feet, and a length of 60 feet. Configuration of the relocated sign faces may be back-to-back, side-by-side, stacked, or in "V" construction with not more than two displays facing any direction. The exception is that if the area of a sign face exceeds 350 square feet, sign faces may not be stacked or placed side-by-side. The sign structure and sign faces are considered to be one sign except for the computation of fees. The new section revises current §21.160(c)(6), (9), and (10) with corrected grammar and removal of unnecessary language. It does not change the general size, configuration, or construction requirements expressed in the current rule. This new section excludes the language of §21.160(c)(6) that required the sign to be placed in the same relative position as to the line of sight, because the provision is unnecessary and set a subjective standard that was difficult to enforce.

New §21.195, Relocation of Sign within Municipality, provides that to relocate a sign from a location within a certified city to another location within the same city only requires the permission of the city. The new section revises current §21.160(g) by correcting grammar and removing unnecessary language. Nothing in the new section dilutes the local control of a certified city.

New §21.196, Relocation Benefits, provides that relocation benefits will be paid in accordance with 43 TAC Chapter 21, Subchapter G for the relocation of an OAS displaced by a highway transportation project. To receive the relocation benefits, the sign owner must enter into a written agreement with the governmental entity that is acquiring the right of way in which the sign is located. By so doing, the sign owner, in consideration of eligible relocation benefits, waives and releases any claim for damages against the governmental entity and the state for any temporary or permanent taking of the sign. The new section restates current §21.160(c)(11) and revises current §21.160(e).

New §21.197, Discontinuance of Sign Due to Destruction, provides for the repair or permit cancellation of a sign that is partially destroyed by an occurrence outside the control of the permit holder, including vandalism, motor vehicle wreck, or natural forces such as wind, tornado, lightening, flood, fire or hurricane. The department will determine whether the sign can be repaired without an amended permit under the rules for customary maintenance. The permit holder must submit an estimate of the proposed work, including an itemized list of the materials to be used and the manner in which the work will be done. For an act of nature, if the department determines the damage is substantial, cost of the repairs to the sign exceed 60 percent of the replace-

ment costs, an amended permit will be required. If the licensee does not request an amended permit, the department may move to cancel the existing permit. If the permit is canceled, the remaining sign structure must be dismantled and removed at the owner's expense. If a decision to cancel the permit is appealed, the sign may not be repaired during the appeal process. The new section restates current §21.156(a) and adds authority for the owner to rebuild the sign if the sign is destroyed by vandalism or a motor vehicle wreck.

New §21.198, Order of Removal, provides that if a sign permit expires without renewal or is canceled or if the sign is erected or maintained in violation of the rules, the department will send a written demand to the sign owner requiring the sign be removed at no cost to the state. Failure of the owner to remove the sign within 30 days allows the department to remove the sign and charge the sign owner for the cost of the removal including the cost of any court proceedings. The new section revises current §21.150(j) and strengthens the position of the state by allowing the department to remove the sign at the sign owner's expense if the owner fails to remove the sign after notice. The 30-day time period was added to provide notice to all parties of the timeframe the department will use to remove the sign. Without a specific timeframe the department was not consistent in processing removals throughout the state. This section also adds authority for the department to rescind a removal notice sent in error in order to correct mistakes before the court settlement process.

New §21.199, Destruction of Vegetation and Access from Right of Way Prohibited, prohibits a person from destroying trees or vegetation on the right of way for any purpose related to a sign or erecting or maintaining a sign from the right of way. The section provides that any of these actions will result in cancellation of the sign's permit whether the violator was the sign owner, permit holder, or someone acting on behalf of the permit holder. The new section clarifies current §21.161 by creating a violation for these actions that is enforceable by the department. Under the current rule the department has had difficulties enforcing the provisions. In addition, language was added to clarify use of right of way for signs in railroad right of way. Until March 1986 the department allowed signs in certain portions of railroad right of way which is also now considered portions of the state right of way. These signs are grandfathered and some are still in existence. Due to the location, use of highway right of way is often the only option for repairs. In these situations the department will allow access to state highway right of way only if the sign owner obtains prior approval from the department.

New §21.200, Local Control, provides the guidelines for the department to authorize political subdivisions to exercise control over off-premise outdoor advertising signs within their incorporated boundaries. The section requires that a city request approval from the department by providing a copy of its sign and zoning regulations, information about the number of personnel who will be dedicated to the program, the types of records that the political subdivision will keep, including an electronic inventory of signs, and an enforcement plan that includes removal of illegal signs. The political subdivision may use more or less restrictive requirements than state rules regarding the size, lighting, and spacing of signs. The department will consult with the Federal Highway Administration to decide whether the political subdivision's program is consistent with the purposes of the Highway Beautification Act of 1965. If approved, the political subdivision will be listed and monitored by the department. The department may de-certify a political subdivision if it violates its accepted regulatory responsibilities and the department may reinstate the approval if the political subdivision demonstrates a new plan that meets the requirements of these rules. The new section revises current §21.151 by making grammatical corrections, removing unnecessary language, and changing current §21.151(d) to require the documents be sent annually to the department and requiring the city to participate in conferences regarding OAS regulations. Centralization will provide a higher level of administrative efficiency for control and consolidation of data, public complaints, and investigation of enforcement activities.

New §21.201, Fees Nonrefundable, provides that all fees paid to the department under the rules are nonrefundable. This new section combines current §21.149(c)(2) and §21.150(g)(4), under which license and permit fees are nonrefundable.

New §21.202, Property Right Not Created, provides that the issuance of a license or permit for an OAS does not create a contract or property right in the license or permit holder. The new section revises current §21.159 with grammatical corrections, rephrasing, and removal of unnecessary language. The context of the language remains the same.

New §21.203, Complaint Procedures, outlines the current compliant process for all outdoor advertising signs. The department will accept and investigate all written complaints. The department will notify the sign owner of the pending investigation and will provide all parties the results of the investigation. This language is included in the rule to provide timelines and the specific process.

New Subchapter J, Regulation of Electronic Signs, §§21.251 - 21.260, revises current §21.163. The new sections divide current §21.163 into 10 sections to provide consistency with the organization and revisions in new Subchapter I and provide a greater level of efficiency for finding and understanding the rules.

New §21.251, Definition, restates the definition of an electronic sign found in current §21.142(8) as a sign, display, or device that changes its message or copy by programmable electronic or mechanical processes.

New §21.252, Department Determination, provides that the use of an electronic image on a digital display is not the use of a flashing, intermittent, or moving light for the purposes of any rule, regulation, or standard promulgated by the department or any agreement between the department and the Secretary of Transportation of the United States. Support of the federal assurance for the rules of the state pertaining to off-premise electronic outdoor advertising signs was obtained on November 19, 2007 by written correspondence from the Federal Highway Administration. The new section is a restatement of current §21.163(a).

New §21.253, Issuance of Permit, provides that an electronic sign requires a permit like any other OAS. The new section states that the application for the permit must satisfy the requirements of new Subchapter J and the applicable parts of Subchapter I. A certified copy of a permit issued by the municipality that has gives permission for the erection of an electronic sign must accompany the application. If the municipality in which the electronic sign will be located does not require the issuance of municipal permits for electronic signs, a certified copy of the written permission from the municipality for the erection of the electronic sign must accompany the application. The new section restates current §21.163(h) without a change in substance.

New §21.254, Prohibitions, provides that electronic signs may not be illuminated by flashing, intermittent, or moving lights, con-

tain or display animated, moving video, or scrolling advertising, consist of a static image projected upon a stationary object, or be a mobile sign located on a truck or trailer. The new section restates current §21.163(b) without a change in substance.

New §21.255, Location, provides the location requirements for electronic signs. Electronic signs may be located, relocated, or upgraded only along regulated highways within the corporate limits of a municipality that allows electronic signs under its sign or zoning ordinances or within the extraterritorial jurisdiction of a municipality that under state law has extended its municipal regulation to include that area. Electronic signs may not be located within 1,500 feet of another electronic sign on the same side of a regulated highway. The new section eliminates the confusion of whether an electronic sign structure can have back to back electronic faces. The current rule allowed each sign to be visible from only one direction. The language created an unnecessary restriction and has been removed from the language.

New §21.256, Modification to Electronic Sign, provides that a sign may be modified to be an electronic sign if a new permit for the new electronic sign is obtained from both the municipality in whose jurisdiction the sign is located and the department. However, lighting may not be added to or used to illuminate a nonconforming sign. The new section restates current §21.163(d).

New §21.257, Requirements, requires each message on an electronic sign to be displayed for at least eight seconds and the change of message must be completed within two seconds and be made simultaneously on the entire sign face. The sign must contain default mechanism that freezes the sign in one position if a malfunction occurs and automatically adjusts the intensity of its display according to natural ambient light conditions. If the department finds that the sign causes glare, impairs vision of drivers, or interferes with the operation of a motor vehicle, the sign owner is required to reduce the intensity of the sign to a level acceptable to the department within 12 hours of request by the department. The new section addresses the safety issue concerns of the use of electronic signs and is a combination of current §21.163(e)(2) and (3), (f), and (g). The current section limits an electronic sign to one electronic face and creates an almost impossible interpretation of "one direction" at an interchange or intersection. The department has determined that there is not a greater safety risk in having a back to back electronic sign than allowing two signs on opposite sides of the highway facing opposite directions. Accordingly, the department has removed the limitation.

New §21.258, Emergency Information, requires the owner of an electronic sign to coordinate with local authorities to display emergency information important to the traveling public, such as Amber Alerts and alerts concerning terrorist attacks or natural disasters. Emergency information messages must remain in the advertising rotation according to the protocols of the agency that issues the information. The section provides for the dissemination of important safety information to the traveling public without a cost to the taxpayers. Provision of the emergency information has the potential of saving lives and provides instantaneous communication tools previously not available to the citizens particularly in metropolitan areas. The new section restates current §21.163(g)(1).

New §21.259, Contact Information, requires the owner of an electronic sign to provide the department with contact information for a person who is available to be contacted at any time and who is able to turn off the electronic sign promptly if a malfunction occurs. New language is added to provide that the contact information will also be provided to the local authority to accommodate the emergency information posting requirement. This change will eliminate the need of passing the emergency information through the department to the sign owner. The remainder of the new section restates current §21.163(g)(2).

New §21.260, Application of Other Rules, provides that provisions of new Subchapter I also apply to electronic signs, unless there is a conflict with new Subchapter J, in which event, new Subchapter J controls. The new section restates the substance of current §21.163(i).

New §21.401, Purpose, introduces new Subchapter K, Control of Signs along Rural Roads. This section restates current §21.401 and provides the purpose of the chapter, which is the regulation of signs along rural roads.

New §21.402, Definitions, provide the definitions for the new subchapter. The new section restates the definitions from current §21.411 with minor grammatical changes. The definition for "sign structure" is added to address other changes in Subchapter K regarding maintenance and repair. The definition for "small business" and "on-premise" are deleted from the new section as unnecessary. On-premise signs are discussed in §21.442.

New §21.403, Prohibited Signs, provides specific circumstances when a sign is prohibited and ineligible for an OAS permit. The new section restates current §21.551, however the language is revised to be consistent with new §21.145 where applicable.

New §21.404, Permit Required, provides the requirement of a permit for an off-premise sign. This section contains the substance of current §21.441(a).

New §21.405, Exemptions, provides a list of signs that are exempt from the requirements of Subchapter K. The language restates the provisions of §21.421(a) with minor grammatical changes, except that §21.421(a)(8) regarding signs no larger than 8 square feet is deleted from this section because that exception is not authorized under the current statute. In addition, provisions from §21.146, Exempt Signs, exempting a sign required by the Railroad Commission for oil and gas leases, a sign that provides the name and contact information for the ranch and that is less than 32 square feet, and a sign identifying a recorded subdivision located at the entrance to the subdivision have been added for better organization of the rules.

New §21.406, Exemptions for Certain Populous Counties, provides the exceptions found in Transportation Code, §394.061 and §394.063. The language is a restatement of current §21.421(c) - (e) with minor grammatical changes.

New §21.407, Existing Off-Premise Signs, exempts certain signs that were in existence before September 1, 1985 from the permit requirement. The language restates current §21.431 with minor changes, except that an amended registration is required to perform customary maintenance to the sign. This change is needed to ensure that the sign is not altered more than what is allowed under customary maintenance.

New §21.408, Continuance of Nonconforming Signs, is added for consistency between the rural and primary road programs. The language is the same as §21.150 and provides that a nonconforming sign can be renewed as long as it remains in substantially the same condition as the sign was on the day it became nonconforming. This language is added to place into the rule a policy the department has been implementing in this program.

New §21.409, Permit Application, provides a detailed listing of the information that must be included on the permit application. This language expands current §21.441(b) to include the requirements under §21.159 that are applicable to rural road permits. The department's intent is to streamline the programs and have consistent requirements for both programs, when appropriate, to eliminate confusion. The new application requirements include written evidence of the right of entry to the sign location.

New §21.410, Withdrawal of Site Owner's Consent, provides the process for the owner of the land to withdraw consent for the sign. This language is not included in current Subchapter K, but department policy allows the land owner to withdrawal consent for signs regulated under that subchapter. The language of this section is similar to the language of §21.161.

New §21.411, Applicant's Identification of Proposed Site, requires the applicant to identify the location of the sign with a stake or a mark depending on the ground surface. This language is not included in current §21.441, however, it is currently a part of the application process. This language mirrors the language in new §21.160 to maintain consistency between the two programs.

New §21.412, Permit Application Review, provides the process by which the department will review and evaluate permit applications. The new section expands the general provisions in current §21.441(b)(3) by defining when a decision on an application is final, clarifying the process for competing sign applications, and stating that the department will complete a site inspection. The language is consistent with §21.163 to provide for consistent processing of all applications.

New §21.413, Decision on Application, provides the actions the department will take for approved and denied applications. This language revises current §21.441(b)(4) and is consistent with new §21.164.

New §21.414, Sign Permit Plate, requires the attachment of a permit plate to the sign structure. The language expands current §21.441(b)(4) by providing procedures for obtaining a replacement permit plate and the consequences for failing to properly attach the permit plate to the sign structure. These provisions are added to conform the two sign programs.

New §21.415, General Sign Location Requirements, provides general information for sign locations. The section provides that permits will only be issued for signs located on rural roads and within 800 feet of a recognized commercial or industrial activity. These provisions state the requirements of Transportation Code, Chapter 394.

New §21.416, Commercial or Industrial Activity, provides the requirements for an activity to qualify as a commercial or industrial activity for purposes of the OAS program. The language originated from current §21.411(13) but is amended to conform with new §21.180. The new language strengthens compliance aspects relating to amount of time the activity must be staffed by an employee. These changes will provide for better enforcement of the provisions and should help to eliminate the problem of a sham business being used to meet the sign location requirements. The language also deletes the requirement of a landline telephone to recognize the emergence of cellular technology. The provisions are consistent with §21.180 and provide for consistent definition of a business activity for both programs.

New §21.417, Erection and Maintenance from Private Property, provides that the department will not issue a sign permit if the sign cannot be erected and maintained from private property. This language is added to be consistent with the language in new §21.167.

New §21.418, Appeal Process for Permit Denials, adds an appeal of a permit denial to the executive director. This provision was added to be consistent with the procedures authorized under the primary road program. The current rules authorize an appeal to the Board of Variance if a sign cannot meet the requirements of the subchapter but the owner feels that an injustice will result if the sign is not authorized, but not an appeal to ensure consistent application of the rules throughout the state. Sign owners are using the variance process to argue that the permit met all requirements but had been wrongly denied by the department. The appeal process is established to mirror the current process for primary roads and matches the language in new §21.170. The new section provides a 20-day request period, which will provide a specific date to finalize an application if an appeal is not requested.

New §21.419, Board of Variance, establishes the board and outlines the responsibility of the board. This section contains the substance of current §21.531 with only minor grammatical changes.

New §21.420, Permit Expiration, provides the date that a permit expires. This language restates current §21.441(c)(1) maintaining the one-year validity period. In addition, the new section states that the permit expires on the date the sign is acquired by the state, which may occur as the result of road construction projects.

New §21.421, Permit Renewals, provides the renewal process for OAS permits. The language expands current §21.441(c) to include a period for acceptance of late renewals. The new language adds a requirement that the OAS permit must be renewed within 30 days of its expiration. Currently, the rules are silent on this and the department has applied inconsistent policies across the state. By adding a specific deadline the department is putting the industry on notice that permits must be renewed in a timely fashion or the sign is subject to removal.

New §21.422, Transfer of Permit, provides the requirements for transferring permits. The language restates current §21.441(d) and is consistent with new §21.173. New language prohibits the transfer of a permit if there is a pending cancellation proceeding regarding the permit, so that the cancellation process can proceed without the necessity of changing the parties involved.

New §21.423, Amended Permit, provides a new amended permit process. This language corresponds to new §21.174 and provides the ability to amend an existing permit to make specific changes. This process will eliminate the need to cancel the existing permit and subsequently apply for a new permit for the same location or sign. The current process is an administrative burden on all parties and this new section provides for a more streamlined procedure.

New §21.424, Permit Fees, provides the fees under Subchapter K. Transportation Code, §394.025 requires the commission by rule to prescribe a fee to issue a permit in an amount the commission determines is sufficient to enable the commission to recover the costs of enforcing the orderly and effective display of outdoor advertising along rural roads.

As explained under §21.175 of this preamble, the department has determined the cost to run an effective revenue neutral OAS program under new §21.423. The fee for an original application

is raised from $96 per sign to $100. The renewal is raised from $40 per sign to $75. The rule also adds the $100 late fee for a permit renewal received within 30 days of the expiration. These fees are the same as those under §21.175 for the interstate and primary highway program.

New §21.425, Cancellation of Permit, provides the procedures for the cancellation of an OAS permit. The section revises current §21.541 but includes specific information about when the department will seek cancellation. The term "revocation" is changed to "cancellation" and additional language is added to correspond with new §21.176. This section also includes the language from current §21.572 regarding the notice and appeal process for cancellations. The new language restates the current rule but provides for a longer period to request a hearing to correspond with other hearing request processes.

New §21.426, Administrative Penalties, provides the process for imposing administrative penalties. The section contains the substance of current §21.542 and §21.572. In addition this section establishes a penalty matrix. The department has reviewed the violations and set a specific dollar amount for certain violations. A permit plate violation is set at $150 per violation, the lowest penalty available under Transportation Code, §394.081. A registration or location violation is set at $250 per violation. The rule makes it a $500 penalty for maintenance from the right of way or performing maintenance without obtaining an amended permit. It is a $1000 penalty, the highest amount authorized under the statute, for erecting the sign from the right of way. The Sunset Commission review for the 2009 legislative session recommended that the department develop a penalty matrix and the department believes it will help eliminate some of the contested cases by offering a set penalty for the violation.

New §21.427, Abandonment of Sign, establishes when the department will consider a sign abandoned and initiate a cancellation action. The language restates current §21.571 with grammatical changes and matches the language in new §21.181 to maintain consistency with the primary highway program.

New §21.428, Sign Face Size and Positioning, provides information about size and height limitations. The language is a restatement of current §21.471 with minor grammatical changes. The size restrictions remain the same. This section also includes language that is in new §21.182 regarding how the sign face size is calculated. Although this measurement calculation is not part of current Subchapter K it is consistent with current policies on determining size of the sign face. Subsection (j), regarding the requirement of an amended permit to change the size of the sign face, is added to ensure consistency with the primary highway program.

New §21.429, Spacing of Signs, clarifies the spacing requirements for signs on rural roads provided by Transportation Code, §394.045. The current rule and statute provide that small signs may be erected closer together than large signs, which may create a compliance problem if there is a larger pre-existing sign. Under current §21.451, a sign of over 301 square feet in size may not be erected closer than 1,500 feet from another off-premise sign. However, a sign of less than 301 square feet may be erected 501 feet from the larger sign. This creates a problem if the pre-existing sign is damaged by an outside force and is required to be replaced. It would no longer be eligible for a permit at that location because it may not be erected within 1,500 feet of the smaller sign. The change to the language clarifies that the department will not permit a new smaller sign that will in turn create a nonconforming sign out of a pre-existing larger sign. The section provides that it is the spacing distance of the larger of the two signs in question that dictates the spacing requirement. Additional language is added to this section to make it consistent with new §21.187 regarding the spacing requirements for an OAS on a primary road.

New §21.430, Multiple Faced Signs, provides the process for determining the size of the sign face of a multiple-faced sign, which is used to determine the spacing requirements. The language restates current §21.481 with grammatical changes.

New §21.431, Wind Load Pressures, provides the amount of wind pressure that signs must be able to withstand. The language restates current §21.441(b)(2)(B) with minor non-substantive changes.

New §21.432, Height Restrictions, provides the restrictions for the height of the sign and sign structure and how the height of the sign is measured. The language restates current §21.461 with grammatical and formatting changes.

New §21.433, Lighting, provides the types of lighting that can be used for an OAS. The current rules lack specific guidelines on lighting. These provisions are consistent with the language in new §21.190. The inclusion of this language in Subchapter K will address an issue that is overlooked in the current rules and provide consistency with the primary road program.

New §21.434, Repair and Maintenance, provides new guidelines for maintaining and repairing an OAS. The new language is the same as new §21.191 to ensure consistent procedures for all signs. As stated in the discussion under new §21.191, the current language was difficult to enforce and relied too heavily on self-reporting to maintain compliance. The new section provides guidance on what qualifies as routine maintenance and customary maintenance and what is a substantial change.

New §21.435, Permit for Relocation of Sign, provides for the relocation of a sign that must be removed because of a road construction project. The current rules do not contain such a provision. With the increase in population, many rural roads are being widened to accommodate more vehicles. The department has seen an increase in the number of requests for the relocation of rural road signs. This section, which is modeled after the current primary highway program and the language in new §21.192, provides that the permit holder must obtain a new permit for the new location, unless only a portion of the sign will be located in the highway right of way after the construction project, in which event the permit holder may apply for an amended permit to adjust the sign to be entirely on private property.

New §21.436, Location of Relocated Sign, provides the order of priority for the location of a relocated sign and tracks new §21.193. The same priority order is used as in the primary highway program. Because the rural road program only requires one business activity to qualify as an unzoned commercial or industrial area there is not a reduction in that requirement. The rules also do not reduce the spacing requirements regarding the spacing between two OAS structures as the spacing is set by statute. In addition, the section specifically states that a sign may not be relocated from a rural road to a highway on the primary system. The relocation provision for signs on the primary system should be reserved for relocations from that system to ensure that there will be adequate spacing for those relocated signs.

New §21.437, Construction and Appearance of Relocated Sign, provides the requirements for materials and size of a relocated sign to match the language of new §21.194. The section pro-

vides that the relocated sign must be constructed with the same type of material and number of poles as the existing sign. The section also requires that the new sign may not be larger than the existing sign and should be placed in the same relative line of sight if possible. These provisions are based on the existing primary highway relocation provisions and are used to maintain consistency between the programs.

New §21.438, Relocation Benefits, identifies the relocation benefits that a sign owner may be entitled to. The section requires a written agreement that includes a release for claims against the government entity for any temporary or permanent taking of the sign. This language is the same as new §21.196 and is included to maintain consistency between the programs.

New §21.439, Discontinuance of Sign Due to Destruction, provides for the repair or cancellation process for signs that are partially destroyed by an occurrence outside the control of the permit holder. The section tracks the language of new §21.197 and contains new provisions regarding destruction caused by vandalism, motor vehicle accidents, and additional natural forces. The current §21.511 is also expanded to address the new cancellation process for failure to obtain an amended permit and repair the damaged sign.

New §21.440, Order of Removal, provides the authority for the department to order the removal of an OAS. The section restates current §21.156 with grammatical changes. In addition, the language includes a 30-day period in which the sign owner must remove the sign, which provides the department with a definite time for proceeding with its next action. Language also authorizes the department to rescind a removal notice if the demand was issued incorrectly. The new language is added to maintain consistency with language that is being added to new §21.198.

New §21.441, Destruction of Vegetation and Access from Right of Way Prohibited, creates a violation if a person destroys vegetation on the right of way or erects or maintains the sign from the right of way. This section addresses problems encountered with the enforcement of current §21.161 under the primary highway program. Currently, the rules do not provide any specific prohibition against removing vegetation or erecting or maintaining from the right of way. This section creates consistent enforcement procedures for all OAS permits.

New §21.442, On-Premise Signs, provides the requirements for on-premise signs on rural roads and revises current §21.501. The language is consistent with §21.147 to maintain uniformity between the programs.

New §21.443, On-Premise Sign Erectors, provides the bond requirements for an entity that is primarily in the business of erecting on-premise signs. It revises current §21.521, with no substantive changes.

New §21.444, Fees Nonrefundable, provides that all fees paid to the department under Subchapter K are nonrefundable. This language is currently in §21.441(e)(2) and is moved to a separate section to make it more conspicuous.

New §21.445, Property Right Not Created, provides specifically that issuance of a permit does not create a property right in the permit holder. It restates current §21.581, with no substantive changes.

New §21.446, Time Proposed Roadway Becomes Subject to Subchapter, establishes when an area becomes subject to the sign permitting requirements based on construction of new roads. The language is the same as §21.151 and is included to create consistency between the two programs.

New Subchapter Q, Regulation of Directional Signs, §§21.941 - 21.947, revises current §21.155, regarding directional signs. This organizational change eliminates potential confusion between a directional sign, which does not require a license or permit, and off-premise outdoor advertising signs. Current §21.155 is divided into seven sections providing for easier location of particular provisions.

New §21.941, Description of Directional Sign, provides the definition of a directional sign in language similar to that of current §21.155(c). A directional sign may only contain a message that identifies an attraction or activity meeting the requirements of this section or provide directional information, such as mileage, route numbers, or exit numbers useful to the traveling public in locating the attraction or activity. A directional sign may not contain descriptive words, phrases, or pictorial or photographic representations of the activity or its environs.

New §21.942, Requirements for Erection and Maintenance of Sign, requires that a person must obtain approval from the department before erecting a directional sign. The application at a minimum must show the proposed location, message content, construction, and dimensions of the sign. No fee for filing the application is required and no permit will be issued for a directional sign. The new section revises current §21.155(a) and (b) without changing the substance of those provisions.

New §21.943, Eligibility, provides the eligibility requirements for a directional sign. The sign must be for a privately owned activity or attraction that is of national or regional interest to the traveling public or must be a natural phenomenon, scenic attraction, outdoor recreational area, or scientific, historic, educational, cultural, or religious site. The department will determine whether the attraction or activity satisfies the requirements and may use among other resources, the National Register of Historic Places and the "Texas State Travel Guide." The new section is a restatement of current §21.155(d) without a change of substance.

New §21.944, Size of Sign, provides that the maximum size of a directional sign, including its border and trim but excluding its supports, is an area of 150 square feet, a height of 20 feet, and a length of 20 feet. The new section is a restatement of current §21.155(f).

New §21.945, Condition of Sign, provides that directional signs must be structurally safe and maintained in good repair and may not be obsolete, move, or have animated or moving parts. The new section restates current §21.155(e)(4), (5), and (6).

New §21.946, Location and Spacing, provides that a directional sign may not be located within 2,000 feet of an interchange, intersection at grade along the interstate or other primary system highway, a rest area, park, or scenic area. A directional sign may not obscure or otherwise interfere with the effectiveness of an official traffic sign, signal, or device, interfere with a driver's view of approaching, merging, or intersecting traffic, be erected on a tree or painted or drawn on a rock or other natural feature, or be located in a rest area, parkland, or scenic area. The distance between two directional signs facing the same direction of travel may not be less than one mile. Further, not more than three directional signs relating to the same attraction or activity and facing the same direction may be erected along a single route that is approaching the attraction or activity. A directional sign located adjacent to the interstate highway system must be within 75 air miles of the attraction or activity and within 50 air

miles if located adjacent to a highway on the primary system. The new section restates current §21.155(e)(2), (3), and (7) and (h).

New §21.947, Lighting of Sign, provides that directional signs may have lights that are a part of or illuminate the sign, but the lights may not be flashing, intermittent, or moving. The lights must be shielded so that they are not directed at any portion of the traveled way of an interstate or primary highway and may not be of such intensity or brilliance that they impair vision of a driver, interfere with the driver's operation, or obscure or interfere with the effectiveness of an official traffic sign, device, or signal. The new section revises current §21.155(g).

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each year of the first five years the repeals and new sections as proposed are in effect, there will be fiscal implications for state governments and local governments as a result of enforcing or administering the repeals and new sections. During the first five years, the department will incur non-personnel costs of $125,000 to provide modifications to the computer programs to accommodate the fee change. That increase in costs will be offset by an increase in revenue of approximately $6.48 million. The increase in revenue will cover not only the new programming costs, but the daily expenses incurred by the department in managing the program over the next five years.

The new sections create a minor cost for a municipality that participates as a certified city. Federal and state laws allow a municipality to regulate outdoor advertisement within its jurisdictional boundaries if it meets minimal requirements. The new sections increase the reporting requirements for a certified city. The certified city is now required to submit annual sign inventories and other additional reports to allow the department to ensure that the city is adhering to the requirements. The current rules require a certified city to maintain an effective enforcement plan. The sections also allow the department to consider whether the city has an accurate sign inventory for purposes of decertification. The new rules require the city to report its enforcement efforts and to provide the department with the inventory in an electronic format that can be merged with the department's state inventory. The department assumes that the reports will be readily available and that the only additional requirement is the conversion of the sign inventory to a format acceptable to the department. The department believes the benefits from the additional requirement far outweigh the additional costs. Failure of the state to effectively oversee a certified city's program could result in the loss of state highway funding.

John Campbell, Director, Right of Way Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the repeals and new sections.

PUBLIC BENEFIT AND COST

Mr. Campbell has also determined that for each year of the first five years the repeals and new sections are in effect, the public benefit anticipated as a result of enforcing or administering the repeals and new sections will be to restructure the Outdoor Advertising Program to achieve maximum efficiency and to comply with federal and state law. The proposed new sections implement substantive changes to address four specific areas: fee structure, streamlining current regulations, methods to increase consistency between the primary and rural road programs, and methods to improve consistent enforcement. The reorganization and restructuring of the program will further the department's vision to be a progressive state transportation agency recognized and respected by the citizens of Texas. In addition, centralization and enforcement of the proposed rules will provide transparency and consistency to the program at a much higher level than the current rules allow under the antiquated organization and fee structure of almost two decades past.

There are anticipated economic costs for persons required to comply with the repeals and new sections as proposed. There will also be an economic effect on small businesses.

The license and permit fee increases do result in an economic impact to small businesses, but the fee increases will provide a more efficient, streamlined, and responsive program to all the citizens of Texas and the outdoor advertising industry.

TAKINGS IMPACT ASSESSMENT

The department has evaluated the proposal to determine whether Government Code, Chapter 2007 (Private Real Property Rights Preservation Act) requires the department to complete a takings assessment. The department has determined that the proposal does not affect private real property in a manner that requires the takings assessment. To constitute a taking the governmental action must cause a reduction of at least 25 percent in the market value of the affected private real property. The department has determined that any reduction in property value resulting from the proposed rules would be significantly less than that amount.

SMALL BUSINESS IMPACT STATEMENT

Under Government Code, §2006.002 a state agency must prepare an Economic Impact Statement (EIS) to assess the potential impact of a proposed rule on small businesses and a Regulatory Flexibility Analysis that considers alternative methods of achieving the purpose of the rule if the proposed rule will have an adverse economic effect on small businesses.

To determine if the economic impact would have an adverse economic effect on small business, the department first had to determine how many small businesses are regulated under the program. The department reviewed its program database, culled duplications and multiple permit holders resulting in a list of 1,220 license holders that accounted for over 14,000 individual sign permits. The department mailed a three question questionnaire to each of the identified companies. The questionnaire required a yes or no answer to the three questions regarding whether the business met the definition of a small business as provided by Government Code, §2006.001(2). The response rate was extremely high with 762 responses representing 57% of the mailed requests. Of the 762 responses, 617 or 81% of the respondents claimed to meet the definition of small business.

During the drafting of the proposed rules the department carefully reviewed the proposed changes to determine which, if any, could potentially result in an economic impact that would burden a small outdoor advertising company. The department determined that the fee increases would have an economic impact on the regulated community.

An increase in fees for licenses and permits will increase costs of small business operations. However, in this circumstance a fee increase is unavoidable to achieve the goals of an efficient and consistent outdoor advertising program. The revenue from the current license and fee structure does not provide the basis of a revenue-neutral program that will meet the program goals for streamlining current regulations, providing increased consis-

tency between the primary and rural road programs, and improving consistent enforcement. The department estimated the total cost of operations under a centralized program that is necessary to achieve the goals of the restructuring to determine the required increase in license and permit fees necessary to support the program on a revenue-neutral basis.

To determine the cost to effectively run the outdoor advertising sign compliance program, the department developed a centralized program which became effective in the Spring of 2010 resulting in 20 full-time staff of outdoor advertising compliance agents moving into field, compliance, monitoring and enforcement positions throughout the state. This was accomplished with internal postings thus all positions were filled with existing department employees from various districts around the state. Under the new centralized program, the agents have been strategically located throughout the state in an effort to equalize workload and minimize travel time and cost. The centralized plan for 20 agents put 5 staff in the north region of the state, 4 in the east region, 4 in the south region and 2 in the west region. The remaining 5 agents office out of the Right of Way Division in Austin, and consist of 1 agent processing all documents related to the more than 14,000 permit applications, renewals, and transfers. Another single agent processes all documents related to the licensing and receipt of revenue for the program. Review of all denials for permits, complaint resolution, open records requests, legislative inquires, policy review, reporting and monitoring of field services is handled by the remaining 3 compliance agents which are located in the headquarters office in Austin.

The cost estimates include the cost of the 20 agents to conduct a complete statewide sign inventory necessary to update the department's records to ensure that all signs have complete electronic and hard copy inventory files. The regulated highways throughout the state are to be continuously inventoried and monitored and account for the largest outdoor advertising regulatory program in the nation when considering the number of signs and the lane miles to be traveled. The inventory process is scheduled for the physical viewing of each regulated sign every 3-4 years to ensure that the department continues to maintain a complete inventory. Based on the cost analysis the department has determined that an average of $1.74 million is needed to efficiently fund the program per year.

In developing the fee structure, the department surveyed other states for alternatives in calculating billboard fees, and reviewed the other fee structures and whether its program was capable of assessing the various fees to determine the best option at this time. The department worked within the confines of the information it has from current billboard permit applications to determine whether it would be able to obtain the required information to assess the fees.

The proposed fee structure for a license under §21.156 does not provide for an increase to the one-time $125 fee for an original license application. The annual license renewal fee is increased to $75 per year, an increase of $15 per year per license from the current $60 fee. Under the license fee increase each current outdoor advertising entity that is required to be licensed will encounter the new $75 annual license renewal fee regardless of the size of the entity.

The proposed rules increase the one-time permit application fee by $6 from $94 per sign permit to $100 per sign permit. The annual permit renewal fee of $40 under the current rule increases to $75 per sign permit in the new rules. Each sign structure is equal to one sign permit.

The proposed rules do not increase fees established under the current rules for replacement permit plates, transfer of permits, or sign permits for non-profit entities.

The proposed rules create an amended permit process in order to make changes to the illumination, the configuration of a multiple faced sign, size of the sign, location of the sign, make substantial repairs or maintenance, or to change to a static face to an electronic face for a one-time fee of $100.

The reason for the proposed increases is so that the operation of the program can be revenue-neutral and the current fee increases are determined to reach that goal, excluding the cost of personnel benefits, rather than to generate revenue for the state.

In preparing the proposed rules the department considered alternative methods of achieving the amount of revenue necessary to fund the program. With each alternative, the department's considerations included analyzing whether the alternate option would minimize the adverse impacts on a small business and yet allow the department to operate a revenue neutral program.

In the comparison of the alternatives, the department considered the effects of the fee increases on a business entity with 10 signs, one with 100 signs, and one with 500 signs. Under the current rules these entities would pay $400, $4,000, and $20,000 per year, respectively, for renewing all their sign permits at the current $40 annual renewal permit fee.

The first alternative considered by the department was an increase of fees as a direct prorated share. Current rules specify fees for sign permits based on a single annual renewal fee per sign structure regardless of the number or size of the sign faces. Continuing with this approach appears to be an efficient and supportable method for determining the cost of a permit fee. To reach a revenue-neutral position for the centralized program, the department divided the cost of operations by the number of active sign permits. At the proposed annual renewal fee of $75 permit, the opportunity to reach a revenue-neutral position is attainable and supported.

Under the first alternative, the three comparison entities would pay $750, $7,500, and $37,500 per year, respectively, for the annual renewal of their sign permits. All three companies would experience an 87.5% increase in the cost of permit renewals. With this increase small sign companies do not suffer adverse economic impacts less or greater than any other sign company on a percentage basis per permit. Larger companies do not gain an advantage over the smaller sign companies on the basis of an economy of scale. In addition, this fee structure allows the department to efficiently manage the program using an easy to determine fee.

The second alternative considered was to base the fee structure on the total number of permits held by a company. Under this scenario, three levels were considered. The department would set the permit fee based on whether the company had fewer than 100 permits, between 100 and 500 permits, or more than 500 permits. Current data indicates less than 40 percent of the total number of license holders have fewer than 100 signs and that number appears to be the best indicator of small sign companies. In a controlled environment, this alternative would appear to be the good alternative in terms of minimizing adverse economic effects to small sign companies. The department would be able to vary the permit fee based on the size of the company's billboard business. However, in considering this alternative the department discovered that it could not adequately identify the size of all the sign companies without a requirement of a license

to obtain a permit for a rural road billboard. The statute does not require a license to erect a sign on a rural road; therefore, the department might not have the information needed to correctly calculate the number of signs a person owns. In addition, a sign company may hold multiple licenses under different corporate entities. Without a determination of each license holder's corporate structure, it is highly possible that a number of entities would fall in the lower category of the range due to the use of different corporate names.

Based on a review of this option the department determined that it did not have adequate information to develop a fee structure based on the number of sign permits held by a sign company. The department also concluded based on its lack of complete ownership information that it is not known if this approach would lessen adverse economic impacts on small sign companies.

The third alternative considered is a graduated fee schedule for permit fees based on the total square footage of the sign faces for each sign structure. While being consistent with the health, safety, environmental, and economic welfare of the state, this alternative would require a certification of the each sign's square footage by each sign owner and verification by department staff in the field. Field verification by the department would require immediate field inventory and measurement for over approximately 14,000 signs in over 200 counties throughout the state. The inventory on all signs can only be accomplished every 3 to 4 years with department staff. Determining a fee schedule based on face size would require an inventory to be accomplished every 1-2 years driving the cost of operations to substantially higher levels to approximately $130 per sign structure. As a revenue-neutral program, the additional costs would be passed on to the sign owners and would not minimize adverse economic impacts on small sign companies.

Considering those alternatives, the analysis leads the department to conclude that none of the three alternatives presented would further minimize adverse economic impacts to small sign companies at the present time. However, of the three alternatives, the first alternative of a simple increase in fees for the annual renewal of permits is the most efficient and supportable method. An annual analysis of the cost of operations compared to the revenue generated by the fee increase will be performed. With this fee schedule the department has minimized the effects of this rule for small businesses.

In summary, the department concludes the rules as proposed accomplish the objectives needed to improve the safety of the general public and the economic welfare of the state with the least amount of economic impact on the regulated industries. The department further concludes that the rules are necessary to achieve a sound system of management and administration of the program.

PUBLIC HEARING

Pursuant to the Administrative Procedure Act, Government Code, Chapter 2001, the Texas Department of Transportation will conduct a public hearing to receive comments concerning the proposed rules. The public hearing will be held at 1:00 p.m. on January 10, 2011, in the first floor hearing room of the Dewitt C. Greer State Highway Building, 125 East 11th Street, Austin, Texas and will be conducted in accordance with the procedures specified in 43 TAC §1.5. Those desiring to make comments or presentations may register starting at 12:30 p.m. Any interested persons may appear and offer comments, either orally or in writing; however, questioning of those making presentations will be reserved exclusively to the presiding officer as may be necessary to ensure a complete record. While any person with pertinent comments will be granted an opportunity to present them during the course of the hearing, the presiding officer reserves the right to restrict testimony in terms of time and repetitive content. Organizations, associations, or groups are encouraged to present their commonly held views and identical or similar comments through a representative member when possible. Comments on the proposed text should include appropriate citations to sections, subsections, paragraphs, etc. for proper reference. Any suggestions or requests for alternative language or other revisions to the proposed text should be submitted in written form. Presentations must remain pertinent to the issues being discussed. A person may not assign a portion of his or her time to another speaker. Persons with disabilities who plan to attend this meeting and who may need auxiliary aids or services such as interpreters for persons who are deaf or hearing impaired, readers, large print or Braille, are requested to contact the Government and Public Affairs Division, 125 East 11th Street, Austin, Texas 78701-2483, (512) 305-9137 at least two working days prior to the hearing so that appropriate services can be provided.

SUBMITTAL OF COMMENTS

Written comments on the proposed repeal of §§21.141 - 21.163, 21.401, 21.411, 21.421, 21.431, 21.441, 21.451, 21.461, 21.471, 21.481, 21.491, 21.501, 21.511, 21.521, 21.531, 21.541, 21.542, 21.551, 21.561, 21.571, 21.572, and 21.581; and new §§21.141 - 21.203, 21.251 - 21.260, 21.401 - 21.446, and 21.941 - 21.947 may be submitted to John Campbell, Director, Right of Way Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on January 28, 2011.

SUBCHAPTER I. REGULATION OF SIGNS ALONG INTERSTATE AND PRIMARY HIGHWAYS

43 TAC §§21.141 - 21.163

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Transportation or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

STATUTORY AUTHORITY

The repeals are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §391.032, which provides authority to establish rules to regulate the orderly and effective display of outdoor advertising on primary roads; Transportation Code, §391.063, which provides authority for the commission to set fees for the issuance of an outdoor advertising license; Transportation Code, §391.065, which provides authority to establish rules to standardize forms and regulate the issuance of outdoor advertising licenses, Transportation Code; §394.004, which provides the commission with the authority to establish rules to regulate the erection and maintenance of signs on rural roads; and Transportation Code, §394.025, which provides authority for the commission to set fees for the issuance of an outdoor advertising license.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 391 and 394.

§21.141. Purpose.

§21.142. Definitions.

§21.143. Maintenance and Continuance.

§21.144. Measurements.

§21.145. Cessation of Activities.

§21.146. Signs Controlled.

§21.147. Exempt Signs.

§21.148. Prohibited Signs.

§21.149. Licenses.

§21.150. Permits.

§21.151. Local Control.

§21.152. Size of Off-Premise Outdoor Advertising Signs.

§21.153. Spacing of Signs.

§21.154. Lighting and Movement of Signs.

§21.155. Directional Signs.

§21.156. Discontinuance of Signs.

§21.157. Wind Load Pressure.

§21.158. Height Restrictions.

§21.159. Property Right Not Created.

§21.160. Relocation.

§21.161. Destruction of Trees/Violation of Control of Access.

§21.162. Appeal Process for Permit Denials.

§21.163. Electronic Signs.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 19, 2010.

TRD-201006612
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: January 2, 2011
For further information, please call: (512) 463-8683

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43 TAC §§21.141 - 21.203

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §391.032, which provides authority to establish rules to regulate the orderly and effective display of outdoor advertising on primary roads; Transportation Code, §391.063, which provides authority for the commission to set fees for the issuance of an outdoor advertising license; Transportation Code, §391.065, which provides authority to establish rules to standardize forms and regulate the issuance of outdoor advertising licenses; Transportation Code, §394.004, which provides the commission with the authority to establish rules to regulate the erection and maintenance of signs on rural roads; and Transportation Code, §394.025, which provides authority for the commission to set fees for the issuance of an outdoor advertising license.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 391 and 394.

§21.141. Purpose.

This subchapter is established to regulate the orderly and effective display of outdoor advertising along a regulated highway within the State of Texas.

§21.142. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Commission--The Texas Transportation Commission.

(2) Department--The Texas Department of Transportation.

(3) Erect--To construct, build, raise, assemble, place, affix, attach, embed, create, paint, draw, or in any other way bring into being or establish.

(4) Freeway--A divided, controlled access highway for through traffic. The term includes a toll road.

(5) Highway--The width between the boundary lines of a publicly maintained way any part of which is open to the public for vehicular travel.

(6) Interchange--A system of interconnecting roadways in conjunction with one or more grade separations that provides for the movement of traffic between two or more roadways or highways on different levels.

(7) Intersection--The term as defined by Transportation Code, §541.303.

(8) Interstate highway system--Highways designated officially by the commission and approved pursuant to 23 United States Code §103 as part of the national system of interstate and defense highways.

(9) License--An outdoor advertising license issued by the department.

(10) Main-traveled way--The traveled way of a highway that carries through traffic. In the case of a divided highway, the traveled way of each of the separate roadways for traffic in opposite directions is a main-traveled way. It does not include such facilities as frontage roads, turning roadways, or parking areas.

(11) National Highway System--Highways designated officially by the commission and approved pursuant to 23 United States Code §103 as part of the national highway system.

(12) Nonconforming sign--A sign that was lawfully erected but no longer complies with a law or rule because the law was enacted or rule adopted after the sign was erected.

(13) Nonprofit sign--A sign that is erected and maintained by a nonprofit organization under a permit issued under §21.149 of this subchapter (relating to Nonprofit Sign Permit).

(14) Person--An individual, association, partnership, limited partnership, trust, corporation, or other legal entity.

(15) Primary system--Highways designated by the commission as the federal-aid primary system and any highway on the National Highway System. The term includes all roads designated as part of the National Highway System as of 1991.

(16) Public park--A public park, forest, playground, nature preserve, or scenic area designated and maintained by a political subdivision or governmental agency.

(17) Regulated highway--A highway on the interstate highway system or primary system.

(18) Rest area--An area of public land designated by the department as a rest area, comfort station, picnic area, or roadside park.

(19) Sign--An object that is designed, intended, or used to advertise or inform, including a sign, display, light, device, figure, painting, drawing, message, plaque, placard, poster, billboard, logo, or symbol.

(20) Sign face--The part of the sign that contains advertising or information and is distinguished from other parts of the sign, including another sign face, by borders or decorative trim. The term does not include a lighting fixture, apron, or catwalk unless it displays a part of the advertising or information contents of the sign.

(21) Sign structure--All of the interrelated parts and materials, such as beams, poles, braces, apron, frame, catwalk, and stringers that are used, designed to be used, or intended to be used to support or display a sign face.

(22) Visible--Capable of being seen, whether legible or not, without visual aid by a person with normal visual acuity.

§21.143. Permit Required.

Except as provided by this chapter, unless a person holds a permit issued under §21.164 of this subchapter (relating to Decision on Application) or §21.200 of this subchapter (relating to Local Control), the person may not erect or maintain an outdoor sign that is:

(1) within 660 feet of the nearest edge of the right of way of a regulated highway if any part of the sign's advertising or information content is visible from any place on the main-traveled way of the highway; or

(2) outside of the jurisdiction of an incorporated city and more than 660 feet from the nearest edge of the right of way of a regulated highway if any part of the sign's advertising or information content is visible from the main-traveled way of the highway and the sign was erected for the purpose of having its advertising or information content seen from the main-traveled way of the highway.

§21.144. License Required.

(a) Except as provided by this subchapter, a person may not obtain a permit for a sign under this subchapter unless the person holds a currently valid license issued under §21.153 of this subchapter (relating to License Issuance) applicable to the county in which the sign is to be erected or maintained.

(b) A license is valid for one year from the date of issuance or most recent renewal.

§21.145. Prohibited Signs.

(a) A sign may not be erected or maintained on a tree or painted or drawn on a rock or other natural feature.

(b) A sign may not be erected or maintained within the right of way of a public roadway or an area that would be within the right of way if the right of way boundary lines were projected across an area of railroad right of way, utility right of way, or road right of way that is not owned by the state or a political subdivision.

(c) A sign may not be erected or maintained on a highway or part of a highway designated under Transportation Code, §391.252.

§21.146. Exempt Signs.

(a) The following signs are exempt from this subchapter:

(1) an on-premise sign that meets the criteria provided by §21.147 of this subchapter (relating to On-premise Sign) except as provided by subsection (c) of this section;

(2) a sign that has the purpose of protecting life or property;

(3) a sign that provides information about underground utility lines;

(4) an official sign that is erected by a public officer, public agency, or political subdivision under the officer's, agency's, or political subdivision's constitutional or statutory authority;

(5) a sign required by the Railroad Commission of Texas at the principal entrance to or on each oil or gas producing property, well, tank, or measuring facility to identify or to locate the property if the sign is no larger than necessary to comply with the Railroad Commission's regulations;

(6) a sign of a nonprofit service club, charitable association, religious organization, chamber of commerce, nonprofit museum, or governmental entity that gives information about the meetings, services, events, or locations of the entity and that does not exceed an area of eight square feet;

(7) a public service sign that:

(A) is located on a school bus stop seating bench or shelter;

(B) identifies the donor, sponsor, or contributor of the shelter;

(C) contains a public service message that occupies at least 50 percent of the area of the sign;

(D) has no content other than that described by subparagraphs (B) and (C) of this paragraph;

(E) is authorized or approved by the law of the entity that controls the highway involved, including being located at a place approved by the entity;

(F) has a sign face that does not exceed an area of 32 square feet; and

(G) is not facing the same direction as any other sign on that seating bench or shelter;

(8) a sign that shows only the name of a ranch on which livestock are raised or a farm on which crops are grown and the directions to, telephone number, or internet address of the ranch or farm and that has a sign face that does not exceed an area of 32 square feet;

(9) a sign that:

(A) relates only to a public election;

(B) is located on private property;

(C) is erected after the 91st day before the date of the election and is removed before the 11th day after the election date;

(D) has a sign face that does not exceed an area of 50 square feet; and

(E) contains no commercial endorsement; and

(10) a sign identifying the name of a recorded subdivision located at an entrance to the subdivision or on property owned by or assigned to the subdivision, home owners association, or other entity associated with the subdivision.

(b) This subchapter does not apply to a sign that was erected before October 23, 1965 and that the commission, with the approval of the Secretary of the United States Department of Transportation, has determined to be a landmark sign of such historic or artistic significance that preservation would be consistent with the purposes of the Highway Beautification Act of 1965, 23 United States Code §131.

(c) An on-premise sign cannot be erected earlier than one year before the date that the business for which the sign is erected will open and conduct business.

§21.147. On-premise Sign.

(a) An on-premise sign is a sign that:

(1) is located on the real property of a business and consists only of:

(A) the name, logo, trademark, telephone number, and internet address of that business; or

(B) an identification of that business's principal and accessory products or services offered on the property;

(2) only advertises the sale of the real property on which the sign is located and is removed within 90 days after the date of the closing of the real property transaction; or

(3) only advertises the lease, including a pre-lease, of the real property on which the sign is located and is removed within 90 days after the date of the closing of the lease transaction.

(b) For the purposes of this section, a sign is located on the real property of a business if:

(1) the real property on which the sign is located and the real property on which the activity of the business is conducted are one contiguous tract that is under common ownership; or

(2) the sign is located on the real property of a commercial development and the businesses of the development share the sign structure of that sign.

(c) For the purpose of subsection (b)(1) of this section, real property is not considered to be a part of one contiguous tract if the real property on which the sign is located is:

(1) separated from the real property on which the business activity is located by a road or highway or by another business;

(2) devoted to a separate purpose unrelated to the advertised business activity;

(3) held under an easement or other lesser property interest than the property interest in the land on which the business activity is located; or

(4) a narrow strip or other configuration of land that cannot be put to any reasonable use related to the advertised business activity other than for signing purposes.

(d) A sign is not an on-premise sign if:

(1) brand name or trade name advertising regarding a product or service that is only incidental to the business activity covers more than 50 percent of the area of a static sign face or for an electronic sign, as defined by §21.251 of this chapter (relating to Definition), if brand name or trade name advertising is displayed 50 percent or more of the time during any five minute period;

(2) the sign advertises activities that are not conducted on the premises; or

(3) the sign provides rental income to the owner of the real property on which it is located, unless the owner of the real property receives the income from an on-premise business for the use of the sign.

(e) For the purposes of this subsection:

(1) the date of the closing of a sales transaction is the date that legal title to a property is conveyed to a purchaser for property under a contract to buy; and

(2) the date of the closing of a lease transaction is the date that the landlord and tenant enter into a binding lease of a property.

§21.148. Exception to License Requirement for Nonprofit Signs.

A nonprofit organization may erect or maintain a nonprofit sign without obtaining an outdoor advertising license, but the organization must obtain a permit under §21.149 of this subchapter (relating to Nonprofit Sign Permit) to erect or maintain such a sign.

§21.149. Nonprofit Sign Permit.

(a) A nonprofit service club, charitable association, religious organization, chamber of commerce, nonprofit museum, or governmental entity may obtain a permit under this section to erect or maintain a nonprofit sign.

(b) To qualify as a nonprofit sign, the sign must:

(1) be in a municipality or the extraterritorial jurisdiction of a municipality;

(2) advertise or promote only:

(A) the municipality;

(B) a political subdivision whose jurisdiction is wholly or partially located in the municipality; or

(C) the entity that will hold the permit, but may only give information about the meetings, services, events, or location of the entity; and

(3) comply with each sign requirement under this subchapter from which it is not specifically exempted.

(c) An application for a permit under this section must be in a form prescribed by the department and must include, in detail, the content of the message to be displayed on the sign.

(d) After a permit is issued, the permit holder must obtain approval from the department to change the message of the sign. The department may issue an order of removal of the sign if the permit holder fails to obtain that approval.

(e) If a sign ceases to qualify as a nonprofit sign, the permit for the sign is subject to cancellation under §21.176 of this subchapter (relating to Cancellation of Permit).

(f) If the holder of a permit issued under this section loses its nonprofit status or wishes to change the sign so that it no longer qualifies as a nonprofit sign the permit holder must:

(1) obtain a license under §21.153 of this subchapter (relating to License Issuance); and

(2) convert the sign permit to a permit for a sign other than a nonprofit sign and pay the original permit and renewal fees provided by §21.175 of this subchapter (relating to Permit Fees).

§21.150. Continuance of Nonconforming Signs.

(a) Notwithstanding other provisions of this subchapter, the department will renew a permit for a nonconforming sign only if the sign structure:

(1) was lawful on the later of the date it was erected or became subject to the control of the department; and

(2) remains substantially the same as it was on the later of the date it was erected or became subject to the department's control.

(b) A sign that was legally erected before March 3, 1986 in a railroad, utility, or road right of way that is not owned by the state or a political subdivision may be maintained as a nonconforming sign if all other requirements of this subchapter are met.

(c) A nonconforming sign may not be:

(1) removed for any reason, other than a request by a condemning authority; or

(2) substantially changed, as described by §21.191 of this subchapter (relating to Repair and Maintenance).

(d) A nonprofit organization that holds a permit for a nonconforming sign that otherwise qualifies for a permit under §21.149 of this subchapter (relating to Nonprofit Sign Permit) may convert the permit to one issued under that section.

§21.151. Time Proposed Roadway Becomes Subject to Subchapter.

For the purposes of this subchapter, a proposed roadway becomes a roadway or a proposed interchange becomes an interchange:

(1) when environmental clearance and the approved alignment have been obtained from the Federal Highway Administration; or

(2) if environmental clearance and approved alignment from the Federal Highway Administration are not required for a proposed roadway, when the alignment is approved by the department or other political subdivision responsible for constructing the roadway.

§21.152. License Application.

(a) To apply for a license under this subchapter, a person must file an application in a form prescribed by the department. The application must include at a minimum:

(1) the complete legal name, mailing address, and telephone number of the applicant; and

(2) designation of each county in which the applicant's signs are to be erected or maintained.

(b) The application must be signed, notarized, and filed with the department and be accompanied by:

(1) a fully executed outdoor advertiser's surety bond:

(A) in the amount of $2,500 for each county designated under subsection (a)(2) of this section up to a maximum of $10,000;

(B) payable to the commission to reimburse the department for removal costs of a sign that the license holder unlawfully erects or maintains; and

(C) in a form prescribed by the department, executed by a surety company authorized to transact business in this state;

(2) a duly certified power of attorney from the surety company authorizing the surety company's representative to execute the bond on the effective date of the bond; and

(3) the license fee prescribed by §21.156 of this subchapter (relating to License Fees).

§21.153. License Issuance.

(a) The department will issue a license if the requirements of §21.152 of this subchapter (relating to License Application) are satisfied.

(b) The department will not issue a license to an entity that is not authorized to conduct business in this state.

§21.154. License Not Transferable.

A license issued under this subchapter is not transferable.

§21.155. License Renewals.

(a) To continue a license in effect, the license must be renewed.

(b) To renew a license, the license holder must file a written application in a form prescribed by the department accompanied by each applicable license fee prescribed by §21.156 of this subchapter (relating to License Fees). The application must be received by the department before the 31st day after the date of the license's expiration and must include at a minimum:

(1) the complete legal name, mailing address, and telephone number of the license holder;

(2) number of the license being renewed;

(3) proof of current surety bond coverage; and

(4) the signature of the license holder or person signing on behalf of the business entity.

(c) A license is not eligible for renewal if the license holder is not authorized to conduct business in this state.

§21.156. License Fees.

(a) The amount of the fee for the issuance of a license issued under this subchapter is $125.

(b) The amount of the annual renewal fee is $75.

(c) In addition to the $75 annual renewal fee, an additional late fee of $100 is required for a renewal license application that is received before the 31st day after the expiration date of the license.

(d) A license fee is payable by check, cashier's check, or money order made payable to the Texas Highway Beautification Fund, and must be submitted with the application. If the check or money order is dishonored upon presentment, the license is voidable.

(e) The department will provide a renewal notification to the licensee at least 30 days before the date of the license expiration and if the license is not renewed before it expires, the department within 10 days after the date of expiration will provide notification to the licensee of the opportunity to file a late renewal application.

§21.157. Temporary Suspension of License.

(a) If the department is notified by a surety company that a bond is being canceled, the department will notify the license holder that a new bond must be obtained and filed with the department before the bond cancellation date or the 30th day after the day of the receipt of the notice, whichever is later.

(b) Notice under this section is presumed to be received on the fifth day after the date of mailing.

§21.158. License Revocation.

(a) The department will revoke a license and will not issue or renew permits or transfer existing permits under the license if:

(1) the surety bond is not provided within the time specified by the department under §21.152 of this subchapter (relating to License Application) or §21.155 of this subchapter (relating to License Renewals);

(2) surety bond coverage is terminated under §21.157 of this subchapter (relating to Temporary Suspension of License);

(3) the number of violations of this subchapter, Subchapter J of this chapter (relating to Regulation of Electronic Signs), or Transportation Code, Chapter 391, committed by the license holder in the aggregate equal or exceed 10 percent of the number of valid permits held by the license holder; or

(4) has not responded to or complied with previous administrative enforcement actions regarding the license or any permit held under the license.

(b) The department will send notice of an action under this section to the address of record provided by the license holder.

(c) The notice will clearly state:

(1) the reasons for the action;

(2) the effective date of the action;

(3) the right of the license holder to request an administrative hearing; and

(4) the procedure for requesting a hearing including the period in which the request must be made.

(d) Notice is presumed to be received five days after the day of its mailing.

(e) A request for an administrative hearing under this section must be made in writing to the department within 20 days after the date that the notice is mailed.

(f) If timely requested, an administrative hearing will be conducted in accordance with Chapter 1, Subchapter E of this title (relating to Procedures in Contested Case).

§21.159. Permit Applications.

(a) To obtain a permit for a sign, a person must file an application in a form prescribed by the department. The application must include, at a minimum:

(1) the complete name and address of the applicant;

(2) the original signature of the applicant;

(3) the proposed location and description of the sign;

(4) the complete legal name and address of the owner of the designated site;

(5) a statement of whether the requested sign is located within an incorporated city or within the city's extraterritorial jurisdiction;

(6) the site owner's or the owner's authorized representative's original signature on the application demonstrating:

(A) consent to the erection and maintenance of the sign; and

(B) right of entry onto the property of the sign location by the department or its agents;

(7) a document from the city that provides the city's current zoning map or the portion of that map applicable to the sign's location; and

(8) information that details how and the location from which the sign will be erected and maintained.

(b) If the sign is a nonprofit sign, the application must include verification of the applicant's nonprofit status.

(c) If the sign is to be located within the jurisdiction of a municipality, including the extraterritorial jurisdiction of the municipality, that is exercising its authority to regulate outdoor advertising, a certified copy of the permit issued by the municipality must be submitted with the application unless documentation is provided to show that the municipality's sign ordinance requires:

(1) the issuance of a department permit before the municipality's; or

(2) the erection of the sign within a period of less than twelve months after the date of the issuance of the municipal permit.

(d) The application must be:

(1) notarized;

(2) filed with the department's division responsible for the outdoor advertising program in Austin; and

(3) accompanied by the fee prescribed by §21.175 of this subchapter (relating to Permit Fees).

(e) The application must include a sketch that shows:

(1) the location of the poles of the sign structure;

(2) the exact location of the sign faces in relation to the sign structure;

(3) the means of access to the sign; and

(4) the distance from the buildings, landmarks, right of way line, other signs, and other distinguishable features of the landscape.

§21.160. Applicant's Identification of Proposed Site.

(a) An applicant for a permit for a new sign must identify the proposed site of the sign by setting a stake or marking the concrete at the proposed location of the center pole of the sign structure or if there is no center pole, at each pole of the sign structure.

(b) At least two feet of a stake must be visible above the ground and must be distinguished from any other stake at the location.

(c) A stake or mark on the concrete may not be moved or removed until the application is denied or if approved, until the sign has been erected.

§21.161. Withdrawal of Site Owner's Consent.

(a) A site owner's consent to the erection and maintenance of the sign and access to the site by the department or its agent is provided with a permit application under §21.159 of this subchapter (relating to Permit Applications). The consent operates for the life of the lease or until the owner delivers to the department and to the sign owner a written statement that permission for the maintenance or inspection by the department or its agents of the sign has been withdrawn and documentation showing that the lease allowing the sign has been terminated in accordance with the terms of the lease agreement or through a court order.

(b) If the sign owner provides documentation that the sign owner is disputing the lease termination in court, the department will not cancel the permit until a court order settling the dispute is delivered to the department.

§21.162. Permit Application for Certain Preexisting Signs.

If a sign was in place before the time that the land on which the sign is located first became subject to Transportation Code, Chapter 391, the

owner of the sign must apply for a permit for the sign within 60 days after the date on which the department sends notice by certified mail to the owner that a permit for the sign is required.

§21.163. Permit Application Review.

(a) The department will consider permit applications in the order of the receipt of the applications.

(b) If an application is returned to an applicant because it is not complete or has incorrect information, the application loses its priority position.

(c) The department will hold an application that is for the same site as or a conflicting site with that of an application that the department previously received until the department makes a final decision on the previously received application or returns it to the applicant. The department will notify the applicant that the applicant's application is being held because an application for the same or a conflicting site was previously received. For the purposes of this subsection, the date of a final decision on an application is:

(1) the date of the final decision on an appeal under §21.170 of this subchapter (relating to Appeal Process for Permit Denials); or

(2) if an appeal is not filed within the period provided by §21.170 of this subchapter, on the 21st day after the date the denial notice was received under §21.164 of this subchapter (relating to Decision on Application).

(d) The department will review the permit application for completeness and compliance with all requirements of this subchapter. Measurements will be taken at the site to determine if the sign placement meets the spacing and location requirements.

§21.164. Decision on Application.

(a) The department will make a decision on an application within 45 days after the date of receipt of the application. If the decision cannot be made within the 45 day period the department will notify the applicant of the delay and provide the reason for the delay and provide an estimate for when the decision will be made.

(b) If the permit application is approved, the department will issue a permit for the sign by sending a copy of the approved application and a sign permit plate to the applicant.

(c) If the permit application is not approved, the department will send a copy of the denied application and a notice that states the reason for the denial.

(d) If an application is denied, the department will notify the landowner identified on the permit application of the denial. The notice is for informational purposes only, and does not convey any rights to the landowner. The landowner may not appeal the denial unless the landowner is also the applicant.

§21.165. Sign Permit Plate.

(a) The sign owner shall securely attach the sign permit plate to the part of the sign structure that is nearest to the highway and visible from the main-traveled way not later than the 30th day after the date that:

(1) the sign is erected; or

(2) the permit is issued if the sign is lawfully in existence when the highway along which it is located becomes subject to this subchapter.

(b) The sign permit plate may not be removed from the sign.

(c) The sign permit plate must remain visible from the main-traveled way at all times.

(d) If a sign permit plate is lost or stolen or becomes illegible, the sign owner must submit to the department a request for a replacement plate on a form prescribed by the department accompanied by the replacement plate fee prescribed by §21.175 of this subchapter (relating to Permit Fees).

(e) Failure to apply for a replacement permit plate or attach the plate to the sign structure as required in subsection (a) of this section within 60 days after the date of receipt of written notification from the department that the permit plate is not attached or not visible may result in the cancellation of the permit under §21.176 of this subchapter (relating to Cancellation of Permit).

§21.166. Sign Location Requirements.

(a) The department will not issue a permit under this subchapter unless the sign for which application is made is located along a roadway to which Transportation Code, Chapter 391, applies and is in:

(1) an unzoned commercial or industrial area; or

(2) a zoned commercial or industrial area.

(b) Subsection (a) of this section does not apply to a sign that was lawfully in existence when it became subject to Transportation Code, Chapter 391.

§21.167. Erection and Maintenance from Private Property.

The department will not issue a permit for a sign unless it can be erected and maintained from private property.

§21.168. Conversion of Certain Authorization to Permit.

(a) The department will convert a registration issued under §21.409 of this chapter (relating to Permit Applications) or a permit issued under §21.407 of this chapter (relating to Existing Off-Premise Signs) to a permit under this subchapter if a highway previously regulated under Transportation Code, Chapter 394 becomes subject to Transportation Code, Chapter 391.

(b) A holder of a permit or registration converted under this section is not required to pay an original permit fee under §21.175 of this subchapter (relating to Permit Fees). The permit must be renewed under §21.172 of this subchapter (relating to Permit Renewals), on the date the renewal of the permit or registration issued under §21.407 or §21.409 of this chapter, as appropriate, would have been due.

(c) If a sign owner has prepaid registration fees under §21.407 of this chapter, the outstanding balance will be credited to the sign owner's annual renewal fee.

(d) The department will issue a sign permit plate to a holder of a permit or a registration converted under this section at no charge. If a replacement plate is needed after the initial issuance, a fee will be charged in accordance with §21.175 of this subchapter.

§21.169. Notice of Sign Becoming Subject to Regulation.

(a) The department will send notice by certified mail to the owner of a sign that becomes subject to Transportation Code, Chapter 391 because of the construction of a new highway, the change in designation of an existing highway, or decertification of a certified city. If the owner of the sign cannot be identified from the information on file with the department, the department will give notice by prominently posting the notice on the sign for a period of 30 consecutive days.

(b) If the owner of a sign described by subsection (a) of this section does not hold a license issued under §21.153 of this subchapter (relating to License Issuance), the owner must obtain the license within 60 days after the day that:

(1) the department sends notice under subsection (a) of this section; or

(2) the 30-day posting period under subsection (a) of this section ends.

§21.170. Appeal Process for Permit Denials.

(a) If a sign permit is denied, the applicant may file a request with the executive director for an appeal.

(b) The request for appeal must:

(1) be in writing;

(2) contain:

(A) a copy of the denied permit application;

(B) a statement of why the denial is believed to be in error; and

(C) evidence that supports the issuance of the application, such as drawings, surveys, or photographs; and

(3) be received within 20 days after the date the denial notice was received.

(c) The executive director or the executive director's designee who is not below the level of assistant executive director, will make a final determination on the appeal within 90 days after the date that the executive director receives the request for appeal. If the determination is that the permit is denied, the executive director or the executive director's designee will send the determination to the applicant stating the reason for denial. If the determination is that the application be approved, the department will issue the permit in accordance with §21.164 of this subchapter (relating to Decision on Application).

(d) If the executive director or designee is unable to make a final determination on the appeal within the 90-day period under subsection (c) of this section, the department will notify the applicant by mail of the delay and provide an estimated time in which a final determination will be made.

§21.171. Permit Expiration.

(a) A permit is valid for one year.

(b) A permit automatically expires on the date that:

(1) the license under which the permit was issued expires or is revoked by the department under §21.158 of this subchapter (relating to License Revocation); or

(2) the sign is acquired by the state.

§21.172. Permit Renewals.

(a) To be continued in effect, a sign permit must be renewed.

(b) A permit is eligible for renewal if the sign for which it was issued continues to meet all applicable requirements of this subchapter and Transportation Code, Chapter 391.

(c) To renew the permit, the permit holder must file with the department a written application in a form prescribed by the department accompanied by the applicable fees prescribed by §21.175 of this subchapter (relating to Permit Fees). The application must be received by the department before the 31st day after the date of the permit's expiration.

(d) A permit may not be renewed if the sign for which it was issued is not erected before the first anniversary of the date that the permit was issued.

§21.173. Transfer of Permit.

(a) A sign permit may be transferred only with the written approval of the department.

(b) At the time of the transfer, both the transferor and the transferee must hold a valid license issued under §21.153 of this subchapter (relating to License Issuance), except as provided in subsections (e) - (g) of this section.

(c) To transfer one or more sign permits, the permit holder must send to the department a written request in a form prescribed by the department accompanied by the prescribed transfer fee.

(d) If the request is approved, the department will send to the transferor and to the transferee a copy of the approved permit transfer form.

(e) A permit issued to a nonprofit organization under §21.149 of this subchapter (relating to Nonprofit Sign Permit) may be transferred to another nonprofit organization that does not hold a license issued under §21.153 of this subchapter if the sign will be maintained as a nonprofit sign.

(f) A permit issued to a nonprofit organization under §21.149 of this subchapter may be converted to a regular permit and transferred to a person that is not a nonprofit organization if the transferee holds a license for the county in which the sign is located at the time of the transfer and the sign meets all requirements of this subchapter.

(g) The department may approve the transfer of one or more sign permits from a transferor whose license has expired to a person who holds a license, with or without the signature of the transferor, if the person provides to the department:

(1) legal documents showing the sign has been sold; and

(2) documents that indicate that the transferor is dead or cannot be located.

(h) The department will not approve the transfer of a permit if cancellation of the permit is pending or has been abated awaiting the outcome of an administrative hearing.

§21.174. Amended Permit.

(a) To perform customary maintenance or to make substantial changes to the sign or sign structure under §21.191 of this subchapter (relating to Repair and Maintenance) a permit holder must submit an amended permit application. To change the sign face of an existing permitted sign to an electronic sign under Subchapter J of this chapter (relating to Regulation of Electronic Signs) a permit holder must submit an amended permit application.

(b) The amended permit application must be submitted on a form prescribed by the department and must provide the information required under §21.159 of this subchapter (relating to Permit Applications) applicable to an amended permit and indicates the change from the information in the original application for the sign permit.

(c) The new sign face size, configuration, or location must meet all applicable requirements of this subchapter and if the amended permit is to erect an electronic sign the requirements of Subchapter J of this chapter.

(d) The holder of a permit for a nonconforming sign may apply for an amended permit to perform eligible customary maintenance under §21.191(b) of this subchapter. An amended permit will not be issued for a substantial change as described by §21.191(c) of this subchapter to a nonconforming sign.

(e) Making a change to a sign that requires an amended permit without first obtaining an amended permit is a violation of this subchapter and will result in an administrative enforcement action.

(f) The department will make a decision on an amended permit application within 45 days of the date of the receipt of the amended

permit application. If the decision cannot be made within the 45 day period the department will notify the applicant of the delay, provide the reason for the delay and provide an estimate of when the decision will be made.

§21.175. Permit Fees.

(a) The amounts of the fees related to permits under this subchapter or Subchapter J of this chapter (relating to Regulation of Electronic Signs) are:

(1) $100 for an original or amended permit for a sign;

(2) $100 for an original or amended permit issued under Subchapter J of this chapter for an electronic sign;

(3) $100 for an original permit for a sign that was lawfully in existence when the sign became subject to Transportation Code, Chapter 391;

(4) $75 for the renewal of a permit;

(5) $75 for the renewal of a permit issued under Subchapter J of this chapter for an electronic sign;

(6) $25 for the transfer of a permit up to a maximum of $2,500 for a single transaction regardless of the location of the sign; and

(7) $25 for a replacement sign permit plate.

(b) The original and renewal permit fee for a nonprofit sign permit is $10.

(c) In addition to the $75 annual renewal fee, an additional late fee of $100 is required for a renewal of a permit that is received before the 31st day after the permit expiration date.

(d) No fee is charged for the transfer of a permit issued to a nonprofit organization to another nonprofit under §21.173 of this subchapter (relating to Transfer of Permit). The fee provided under subsection (a)(6) of this section applies to the conversion and transfer of a permit issued to a nonprofit organization to a person other than a nonprofit organization under §21.173 of this subchapter.

(e) A fee prescribed by this section is payable by check, cashier's check, or money order. If a check or money order is dishonored upon presentment, the permit, renewal, or transfer is void.

§21.176. Cancellation of Permit.

(a) The department will cancel a permit for a sign if the sign:

(1) is removed, unless the sign is removed and re-erected at the request of a political subdivision;

(2) is not maintained in accordance with this subchapter or Transportation Code, Chapter 391;

(3) is damaged beyond repair, as determined under §21.197 of this subchapter (relating to Discontinuance of Sign Due to Destruction);

(4) is abandoned, as determined under §21.181 of this subchapter (relating to Abandonment of Sign);

(5) is erected after the effective date of this section and is not built within ten feet of the location described in the permit application or is built within ten feet of the location described in the permit application but at a location that does not meet all spacing requirements of this chapter or in accordance with the sketch or other assertions contained in the permit application;

(6) is repaired or altered without obtaining a required amended permit under §21.174 of this subchapter (relating to Amended Permit);

(7) is built by an applicant who uses false information on a material issue of the permit application;

(8) is erected, repaired, or maintained in violation of §21.199 of this subchapter (relating to Destruction of Vegetation and Access from Right of Way Prohibited);

(9) has been made more visible by the permit holder clearing vegetation from the highway right of way in violation of §21.199 of this subchapter;

(10) is located in an unzoned commercial or industrial area and the department has evidence that an activity supporting the unzoned commercial or industrial area was created primarily or exclusively to qualify the area as an unzoned commercial or industrial area, and that no business has been conducted at the activity site within one year; or

(11) does not have the permit plate properly attached under §21.165 of this subchapter (relating to Sign Permit Plate).

(b) Before initiating an enforcement action under this section, the department will notify the sign owner in writing of the violation of subsection (a)(5) or (11) of this section and will give the sign owner 60 days to correct the violation and provide proof of the correction the department.

(c) Upon determination that a permit should be canceled, the department will mail a notice of cancellation to the address of the record license holder. The notice must state:

(1) the reason for the cancellation;

(2) the effective date of the cancellation;

(3) the right of the permit holder to request an administrative hearing on the cancellation; and

(4) the procedure for requesting a hearing and the period for filing the request.

(d) A request for an administrative hearing under this section must be in writing and delivered to the department within 20 days after the date that the notice of cancellation is received.

(e) If timely requested, an administrative hearing will be conducted in accordance with Chapter 1, Subchapter E of this title (relating to Procedures in Contested Case) and the cancellation is abated until the cancellation is affirmed by order of the commission.

(f) A permit holder may voluntarily cancel a permit by submitting a request in writing after the sign has been removed. Subsections (c) - (e) of this section do not apply to a permit voluntarily canceled under this subsection.

(g) The department will notify the landowner identified on the permit application of a cancellation enforcement action. The notice is for informational purposes only, and does not convey any rights to the landowner. The landowner may not appeal the cancellation unless the landowner is also the holder of the permit.

§21.177. Commercial or Industrial Area.

For the purposes of this subchapter, a commercial or industrial area is:

(1) a zoned commercial or industrial area described by §21.178 of this subchapter (relating to Zoned Commercial or Industrial Area); or

(2) an unzoned commercial or industrial area described by §21.179 of this subchapter (relating to Unzoned Commercial or Industrial Area).

§21.178. Zoned Commercial or Industrial Area.

A zoned commercial or industrial area is an area that is designated, through a comprehensive zoning action, for general commercial or industrial use by a political subdivision with legal authority to zone. An area is not a zoned commercial or industrial area if it is:

(1) an area in which limited commercial or industrial activities incident to other primary land uses is allowed;

(2) an area that is designated for and created primarily to allow outdoor advertising structures along a regulated highway;

(3) an unrestricted area; or

(4) a small parcel or narrow strip of land that cannot be put to ordinary commercial or industrial use and that is designated for a use classification that is different from and less restrictive than its surrounding area.

§21.179. Unzoned Commercial or Industrial Area.

(a) An unzoned commercial or industrial area is an area that:

(1) is within 800 feet, measured along the edge of the highway right of way perpendicular to the centerline of the main-traveled way, of and on the same side of the highway as the principal part of at least two adjacent recognized commercial or industrial activities that meet the requirements of subsection (c) of this section;

(2) is not predominantly used for residential purposes; and

(3) has not been zoned under authority of law.

(b) A part of the regularly used buildings, parking lots, or storage or processing areas of each of the commercial or industrial activities must be within 200 feet of the highway right of way and the permanent building in which the activity is conducted must be visible from the main-traveled way.

(c) For commercial or industrial activities to be considered adjacent for the purposes of subsection (a)(1) of this section, the regularly used buildings, parking lots, storage or processing areas of the activities may not be separated by a vacant lot, an undeveloped area that is more than 50 feet wide, a road, or a street.

(d) Two activities that occupy the same building qualify as adjacent activities for the purposes of subsection (a)(1) of this section, if:

(1) each activity:

(A) has at least 400 square feet of floor space dedicated to that activity; and

(B) is an activity that is customarily allowed only in a zoned commercial or industrial area;

(2) the two activities are separated by a dividing wall constructed from floor to ceiling;

(3) the two activities have separate and independent access and have separate and independent access to the restroom facilities; and

(4) the two activities operate independently of one another.

(e) For the purposes of subsection (d) of this section, two separate product lines offered by one business are not considered to be two activities.

(f) To determine whether an area is not predominantly used for residential purposes under subsection (a)(2) of this section, not more than 50 percent of the area, considered as a whole, may be used for residential purposes. A road or street is considered to be used for residential purposes only if residential property is located on both of its sides. The area to be considered is the total of actual or projected frontage of the commercial or industrial activities plus 800 feet on each side of that frontage, measured along the highway right of way to a depth of 660 feet. The depth of an unzoned commercial or industrial area is measured from the nearest edge of the highway right of way perpendicular to the centerline of the main-traveled way of the highway.

(g) The length of an unzoned commercial or industrial area is measured from the outer edge of the regularly used building, parking lot, storage, or processing area of the commercial or industrial activity and along or parallel to the edge of the pavement of the highway. If the business activity does not front the highway, a projected frontage is measured from the outer edge of the regularly used building, parking lot, storage, or processing area to a point perpendicular to the centerline of the main-traveled way.

(h) A sign is not required to meet the requirements of subsection (d)(1)(A), (2), or (3) of this section to maintain conforming status if the permit for the sign was issued before the effective date of this section.

§21.180. Commercial or Industrial Activity.

(a) For the purposes of this subchapter, a commercial or industrial activity is an activity that:

(1) is customarily allowed only in a zoned commercial or industrial area; and

(2) is conducted in a permanent building or structure permanently affixed to the real property that:

(A) has an indoor restroom, running water, functioning electrical connections, and permanent flooring, other than dirt, gravel, or sand;

(B) is visible from the traffic lanes of the main-traveled way;

(C) is not primarily used as a residence; and

(D) has at least 400 square feet of its interior floor space devoted to the activity.

(b) The following are not commercial or industrial activities:

(1) agricultural, forestry, ranching, grazing, farming, and related activities, including the operation of a temporary wayside fresh produce stand;

(2) an activity that is conducted only seasonally;

(3) an activity that has not been conducted at its present location for at least 180 days;

(4) an activity that is not conducted by at least one person who works for the business at the activity site for at least 25 hours per week on at least five days per week and for which the hours during which the activity is conducted are posted at the activity site;

(5) the operation or maintenance of:

(A) an outdoor advertising structure;

(B) a recreational facility, such as a campground, golf course, tennis court, wild animal park, or zoo, other than the related activities conducted in a building or structure that meets the requirements of subsection (a)(2) of this section and the parking facilities for that building or structure;

(C) an apartment house or residential condominium;

(D) a public or private preschool, secondary school, college, or university, other than a trade school or corporate training campus;

(E) a quarry or borrow pit, other than the related activities conducted in a building or structure that meets the requirements

of subsection (a)(2) of this section and the parking facilities for that building or structure;

(F) a cemetery; or

(G) a place that is primarily used for worship;

(6) an activity that is conducted on a railroad right of way; and

(7) an activity that is created primarily or exclusively to qualify an area as an unzoned commercial or industrial area.

(c) For the purposes of this section, a building is not primarily used as a residence if more than 50 percent of the building's square footage is used solely for the business activity.

(d) A sign is not required to meet the requirements of subsection (a)(2)(C) (as clarified by subsection (c) of this section), (a)(2)(D), (b)(3), or (b)(4) of this section to maintain conforming status if the permit for the sign was issued before the effective date of this section.

§21.181. Abandonment of Sign.

(a) The department may consider a sign abandoned and cancel the sign's permit if:

(1) the sign face is blank or without legible advertising or copy for a period of 365 consecutive days or longer; or

(2) the sign needs to be repaired or is overgrown by trees or other vegetation.

(b) Small temporary signs, such as garage sale signs or campaign signs, that are attached to the structure do not constitute legible advertising or copy for the purpose of ending the period under subsection (a)(1) of this section.

(c) The department will not consider the payment of property taxes or the retention of a sign as a balance sheet asset in determining whether the sign permit should be canceled under this section.

(d) The department may initiate the cancellation process if the department has evidence that supports the fact that the sign face has been blank or has been without legible advertisement or copy for 365 days, such as photographs showing that on at least four dates throughout the 365-day period the sign was in the same condition or was degrading. Evidence is not required for each of the 365 days.

(e) If the location of the abandoned sign is allowed under this subchapter, the department may issue a permit for the sign site to anyone who submits an application that meets the requirements of this subchapter. The department will not issue a permit for an abandoned sign that is located in a place that does not meet the requirements of this subchapter.

(f) For the purposes of this section "copy" includes any advertisement that the sign is available for lease.

(g) A multi-face sign is not abandoned unless all sign faces may be considered abandoned under this section.

(h) Before initiating a cancellation process under this section the department will provide notice to the sign owner and land owner as identified on the permit application of the abandonment determination and allow the sign owner 60 days to correct the issue.

§21.182. Sign Face Size and Positioning.

(a) A sign face may not exceed:

(1) 672 square feet in area;

(2) 25 feet in height; and

(3) 60 feet in length.

(b) For the purposes of this section, border and trim are included as part of the sign face.

(c) Notwithstanding the area limitation provided by subsection (a)(1) of this section, one or more temporary protrusions may be added to a sign, provided that:

(1) the sign face, including the protrusions, meets the height and length limitations of subsection (a) of this section;

(2) the area of the protrusion does not exceed 25 percent of the area indicated on the sign permit; and

(3) the sign face, including the area of the protrusions, does not exceed 807 square feet in area.

(d) The area is measured by the smallest square, rectangle, triangle, circle, or combination that encompasses the entire sign face.

(e) A sign may have two or more sign faces that are placed back-to-back, side-by-side, stacked, or in "V" type construction with not more than two faces presented in each direction. If such an arrangement is used, the sign structure or structures are considered to be one sign for all purposes. Two sign faces which together exceed 672 square feet in area, including temporary protrusions, may not face in the same direction.

(f) Two sign faces that face in the same direction may be presented as one face by covering both faces and the area between the faces with an advertisement, as long as the size limitations of subsection (a) of this section are not exceeded.

§21.183. Signs Prohibited at Certain Locations.

A sign may not be located in a place that creates a safety hazard, including a location that:

(1) causes a driver to be unduly distracted;

(2) obscures or interferes with the effectiveness of an official traffic sign, signal, or device; or

(3) obscures or interferes with the driver's view of approaching, merging, or intersecting traffic.

§21.184. Location of Signs Near Parks.

(a) The center of a sign may not be located within 250 feet of the nearest point of the boundary of a public park.

(b) This subsection applies only if a public park boundary abuts the right of way of a regulated highway. A sign may not be located within 1,500 feet of the boundary of the public park, as measured along the right of way line from the nearest common point of the park's boundary and the right of way. This limitation applies:

(1) on both sides of a highway that is on a nonfreeway primary system; or

(2) on the side of a highway on which the public park is located, if the highway is on an interstate or freeway primary system.

§21.185. Location of Signs Near Certain Facilities.

(a) A sign may not be erected along a freeway or interstate regulated highway that is outside an incorporated municipality in an area that is adjacent to or within 1,000 feet of:

(1) an interchange or intersection at grade; or

(2) a rest area, ramp, or the highway's acceleration and deceleration lanes.

(b) The distance from a ramp or acceleration or deceleration lane is measured from the point of the pavement widening at the beginning of the entrance or exit ramp and from the point that the pavement widening ends at the conclusion of the entrance or exit ramp.

(c) The distance from a rest area is measured along the right of way line from the outer edges of the rest area boundary abutting the right of way.

(d) An area is adjacent to a rest area or a highway's acceleration or deceleration lane if the area is between the point of the highway widening at the beginning of the entrance or exit ramp and the point that pavement widening ends at the conclusion of the entrance or exit ramp.

(e) All measurements are taken from a point perpendicular to the highway and along the highway right or way.

§21.186. Location of Signs Near Right of Way.

A sign may not be erected so that the part of the sign face nearest a highway is within five feet of the highway's right of way line.

§21.187. Spacing of Signs.

(a) Signs on the same side of a regulated freeway, including freeway frontage roads, that are outside of incorporated municipal boundaries may not be erected closer than 1,500 feet apart.

(b) For a highway on a non-freeway primary system and outside the incorporated boundaries of a municipality, signs on the same side of the highway may not be erected closer than 750 feet apart.

(c) For a highway on a non-freeway primary system highway and within the incorporated boundaries of a municipality, signs on the same side of the highway may not be erected closer than 300 feet apart.

(d) For the purposes of this section, the space between signs is measured between points along the right of way of the highway perpendicular to the center of the signs.

(e) For the purposes of this section, a municipality's extraterritorial jurisdiction is not considered to be included within the boundaries of the municipality.

(f) This section does not apply to directional signs.

(g) The spacing requirements of this section do not apply to signs separated by buildings, natural surroundings, or other obstructions in a manner that causes only one of the signs to be visible within the specified spacing area.

§21.188. Wind Load Pressure.

An application for new sign permit or a permit renewal must include a certification signed by the applicant that the proposed or existing sign will withstand wind load pressures in pounds per square foot as set out in the following table.
Figure: 43 TAC §21.188

§21.189. Sign Height Restrictions.

(a) A sign may not be erected that exceeds an overall height of 42-1/2 feet.

(b) A roof sign that has a solid sign face surface may not at any point exceed 24 feet above the roof level.

(c) A roof sign that has an open sign face in which the uniform open area between individual letter or shapes is not less than 40 percent of the total gross area of the sign face may not at any point exceed 40 feet above the roof level.

(d) The lowest point of a projecting roof sign or a wall sign must be at least 14 feet above grade.

(e) For the purposes of this section, height is measured from the grade level of the centerline of the main-traveled way closest to the sign, at a point perpendicular to the sign location. A frontage road of a controlled access highway or freeway is not considered the main-traveled way for purposes of this subsection.

§21.190. Lighting of and Movement on Signs.

(a) A sign may not contain or be illuminated by flashing, intermittent, or moving lights, including any type of screen using animated or scrolling displays, except that this subsection does not apply to a sign that only provides public service information, such as time, date, temperature, weather, or similar information.

(b) Except for a relocated sign, any new sign may be illuminated but only by:

(1) upward lighting of no more than 4 luminaries per direction of the sign face or faces of the structure; or

(2) downward lighting of no more than 4 luminaries per direction of the sign face or faces of the structure.

(c) Lights that are a part of or illuminate a sign:

(1) must be shielded, directed, and positioned to prevent beams or rays of light from being directed at any portion of the traveled ways of a regulated highway;

(2) may not be of such intensity or brilliance as to cause vision impairment of a driver of any motor vehicle on a regulated highway or otherwise interfere with the driver's operation of a motor vehicle; and

(3) may not obscure or interfere with the effectiveness of an official traffic sign, device, or signal.

(d) A temporary protrusion on a sign may be animated only if it does not create a safety hazard to the traveling public. A temporary protrusion may not be illuminated by flashing or moving lights or enhanced by reflective material that creates the illusion of flashing or moving lights.

(e) Reflective paint or reflective disks may be used on a sign face only if the paint or disks do not:

(1) create the illusion of flashing or moving lights; or

(2) cause an undue distraction to the traveling public.

(f) A neon light may be used on a sign face only if:

(1) the light does not flash;

(2) the light does not cause an undue distraction to the traveling public; and

(3) the permit for the sign specifies that the sign is an illuminated sign.

(g) This subchapter does not prohibit a temporary protrusion that displays only alphabetical or numerical characters and that satisfies this subsection and the requirements of §21.182 of this subchapter (relating to Sign Face Size and Positioning), relating to a temporary protrusion. The display on the temporary protrusion may be a digital or other electronic display, but if so:

(1) it must consist of a stationary image;

(2) it may not change more frequently than twice in any 24 hour period; and

(3) the process of any change of display must be completed within one minute.

§21.191. Repair and Maintenance.

(a) The following are considered to be routine maintenance activities that do not require an amended permit:

(1) the replacement of nuts and bolts;

(2) nailing, riveting, or welding;

(3) cleaning and painting;

(4) manipulation of the sign structure to level or plumb it;

(5) changing of the advertising message; and

(6) the replacement of minor parts if the materials of the minor parts are the same type as those being replaced and the basic design or structure of the sign is not altered.

(b) The following are considered to be customary maintenance activities that may be made but require an amended permit before the initiation of such an activity:

(1) changing all or part of the sign face structure but only if materials similar to those of the sign face being replaced are used;

(2) upgrading existing lighting for an energy efficient lighting system;

(3) replacement of poles, but only if not more than one-half of the total number of poles of the sign structure are replaced in any 12 month period and the same material is used for the replacement poles; and

(4) adding a catwalk to the sign structure.

(c) The following are examples of substantial changes that may be made but require an amended permit application before the initiation of such an activity:

(1) adding lights to an unilluminated sign or adding more intense lighting to an illuminated sign whether or not the lights are attached to the sign structure;

(2) changing the number of poles in the sign structure;

(3) adding permanent bracing wires, guy wires, or other reinforcing devices;

(4) changing the material used in the construction of the sign structure, such as replacing wooden material with metal material;

(5) adding faces to a sign or changing the sign configuration;

(6) increasing the height of the sign;

(7) changing the configuration of the sign structure, such as changing a "V" sign to a stacked or back to back sign, or a single face sign to a back-to back sign; and

(8) moving the sign structure or sign face in any way unless the movement is made in accordance with §21.192 of this subchapter (relating to Permit for Relocation of Sign).

(d) To add a catwalk to a sign structure the catwalk must meet Occupational Safety and Health Administration guidelines.

§21.192. Permit for Relocation of Sign.

(a) A sign may be relocated in accordance with this section, §21.193 of this subchapter (relating to Location of Relocated Sign), §21.194 of this subchapter (relating to Construction and Appearance of Relocated Sign), and §21.195 of this subchapter (relating to Relocation of Sign within Municipality) if the sign is legally erected and maintained and will be within the highway right of way as a result of a highway construction project.

(b) To relocate a sign under this section, the permit holder must obtain a new permit under §21.164 of this subchapter (relating to Decision on Application), but the permit fee is waived.

(c) To receive a new permit to relocate a sign under this section, the permit holder must submit a new permit application that identifies that the application is for the relocation of an existing sign due to a highway construction project. The new location must meet all local codes, ordinances, and applicable laws.

(d) Notwithstanding other provisions of this section, if only a part of a sign will be located within the highway right of way as a result of the construction project, the sign owner may apply to amend the existing permit for the sign to authorize:

(1) the adjustment of the sign face on a monopole sign that would overhang the proposed right of way to the land on which the sign's pole is located, including adding a second pole if required to support the adjustment for a legal non-conforming monopole sign;

(2) the relocation of the poles and sign face of a multiple sign structure that are located in the proposed right of way from the proposed right of way to the land on which the other poles of the sign structure are located; or

(3) a reduction in the size of a sign structure that is located partially in the proposed right of way so that the sign structure and sign face are removed from the proposed right of way.

(e) A permit application for the relocation of a sign must be submitted within 18 months after the earlier of the date the original sign was removed or the date the original sign was required to move. Upon written request by the permit holder, the department shall grant an additional six months to submit an application.

§21.193. Location of Relocated Sign.

(a) To receive a new permit for relocation, an existing sign must be relocated to one of the following locations, as listed in order of priority:

(1) on the same parcel of land on which the existing sign is located in a location that is allowed under this section and that is within 50 feet of a line drawn through the center point of the existing sign structure and perpendicular to the edge of the highway right of way nearest to the existing sign; or

(2) on a part of the same parcel of land on which the sign was situated before relocation in a location that is allowed under this section.

(b) If the sign owner can demonstrate that both of the locations under subsection (a) of this section are not physically or economically feasible for a sign structure, the sign owner, on approval by the department, may relocate the sign to any other location that is allowed under this subsection. The owner is not entitled to additional relocation benefits under §21.196 of this subchapter (relating to Relocation Benefits) if the sign structure is relocated further than 50 miles from the location of the existing sign.

(c) The location of the relocated sign must be within a zoned commercial or industrial area as described by §21.178 of this subchapter (relating to Zoned Commercial or Industrial Area) or an unzoned commercial or industrial area, as described by §21.179 of this subchapter (relating to Unzoned Commercial or Industrial Area) except that an unzoned commercial or industrial area may include only one recognized commercial or industrial activity.

(d) A sign may not be relocated to a place where it:

(1) can cause a driver to be unduly distracted in any way;

(2) will obscure or otherwise interfere with the effectiveness of an official traffic sign, signal, or device; or

(3) will obstruct or interfere with the driver's view of approaching, merging, or intersecting motor vehicle or rail traffic.

(e) A sign may not be relocated to a place that is:

(1) within 500 feet of a public park that is adjacent to a regulated highway, with the limitation provided under this paragraph applying:

(A) on either side of a regulated highway that is on a nonfreeway primary system; or

(B) on the side of the highway adjacent to the public park if the regulated highway is on an interstate or freeway primary system;

(2) if outside of an incorporated municipality along a regulated highway, adjacent to or within 500 feet of:

(A) an interchange, intersection at grade, or rest area; or

(B) a ramp or the ramp's acceleration or deceleration lane;

(3) for a highway on the interstate or freeway primary system, closer than 500 feet to another permitted sign on the same side of the highway;

(4) for a highway on the nonfreeway primary system and outside of a municipality, closer than 300 feet to another permitted sign on the same side of the highway;

(5) for a highway on the nonfreeway primary system and within the incorporated boundaries of a municipality, closer than 100 feet to another permitted sign on the same side of the highway; or

(6) within five feet of any highway right of way line.

(f) A sign, at the time of and after its relocation, must be within 800 feet of at least one recognized commercial or industrial activity about which the sign provides information and that is located on the same side of the highway.

(g) The spacing limitations provided in subsection (e) of this section do not apply to on-premise signs or directional or official signs that are exempted from the application of Transportation Code, §391.031.

(h) A sign may not be relocated from a road regulated under this subchapter to a rural road regulated by Subchapter K of this chapter (relating to Control of Signs along Rural Roads).

§21.194. Construction and Appearance of Relocated Sign.

(a) A relocated sign must be constructed with the same number of poles and of the same type of materials as the existing sign. A relocated sign may not exceed the maximum height provided by §21.189 of this subchapter (relating to Sign Height Restrictions). The number of sign faces and lighting, if any, of the relocated sign may not exceed the number of faces or lighting, if any, of the existing sign.

(b) The size of each of the sign faces of a relocated sign that are visible to approaching traffic may not exceed the smaller of the size of the existing sign face or an area of 1,200 square feet, a height of 25 feet, and a length of 60 feet.

(c) The sign faces of a relocated sign may be placed back-to-back, side-by-side, stacked, or in "V" type construction with not more than two displays facing any direction, except that if the area of a sign face exceeds 350 square feet, sign faces may not be stacked or placed side-by-side. The sign structure and sign faces are considered one sign.

§21.195. Relocation of Sign within Municipality.

(a) If an existing sign is located within the incorporated boundaries of a municipality that is approved by the department to control outdoor advertising under §21.200 of this subchapter (relating to Local Control) and the sign will be relocated within the incorporated boundaries of the same municipality, permission to relocate the sign must be obtained only from the municipality in accordance with the municipality's sign and zoning ordinances.

(b) Permission from the municipality to relocate the sign is required to receive relocation benefits from the department under §21.196 of this subchapter (relating to Relocation Benefits).

§21.196. Relocation Benefits.

(a) Relocation benefits will be paid in accordance with Subchapter G of this chapter (relating to Relocation Assistance and Benefits) for the relocation of a sign under §21.192 of this subchapter (relating to Permit for Relocation of Sign) or §21.195 of this subchapter (relating to Relocation of Sign within Municipality).

(b) The owner of an existing sign that is being relocated must enter into a written agreement with the governmental entity that is acquiring the right-of-way in which the sign is located. In the agreement the owner, in consideration of the payment by the governmental entity of relocation benefits, waives and releases any claim for damages against the governmental entity and the state for any temporary or permanent taking of the sign.

§21.197. Discontinuance of Sign Due to Destruction.

(a) If a sign is partially destroyed by a natural force outside the control of the permit holder, including wind, tornado, lightening, flood, fire, or hurricane, the department will determine whether the sign can be repaired without an amended permit.

(b) The department may require the permit holder to submit an estimate of the proposed work, including an itemized list of the materials to be used and the manner in which the work will be done. The department will allow the sign to be repaired without an amended permit if the department determines that the damage is not substantial. If the damage is determined to be substantial the sign owner must obtain an amended permit under §21.174 of this subchapter (relating to Amended Permit).

(c) The department will cancel the existing permit if it determines the damage to the sign is substantial under subsection (g) of this section and an amended permit is not obtained by the sign owner within one year after the date that the department first became aware of the damage.

(d) If a permit is canceled under this section or §21.176 of this subchapter (relating to Cancellation of Permit) the remaining sign structure must be dismantled and removed without cost to the state.

(e) A sign that is totally or partially destroyed by vandalism or a motor vehicle accident may be rebuilt as described on the most recently approved permit application.

(f) If a decision to cancel a permit is appealed, the sign may not be repaired during the appeal process.

(g) Damage is considered to be substantial if the cost to repair the sign would exceed 60 percent of the cost to replace it with a sign of the same basic construction using new materials and at the same location.

§21.198. Order of Removal.

(a) If a sign permit expires without renewal or is canceled or if the sign is erected or maintained in violation of this subchapter, the owner of the sign, on a written demand by the department, shall remove the sign at no cost to the state.

(b) If the owner does not remove the sign within 30 days of the day that the demand is sent, the department will remove the sign and will charge the sign owner for the cost of removal, including the cost of any court proceedings.

(c) The department will rescind a removal demand if the department determines the demand was issued incorrectly.

§21.199. Destruction of Vegetation and Access from Right of Way Prohibited.

(a) A person may not:

(1) trim or destroy a tree or other vegetation on the right of way for any purpose related to this subchapter; or

(2) erect or maintain a sign from the right of way.

(b) The department will initiate enforcement action if the permit holder, or someone acting on behalf of the permit holder, violates this section.

(c) Subsection (a)(2) of this section does not apply to the maintenance of a sign if:

(1) the state right of way is the only available access for a sign on railroad right of way to which §21.150(b) of this subchapter (relating to Continuance of Nonconforming Signs) applies; and

(2) the sign owner notifies the department and obtains approval of the department before accessing the sign for maintenance.

§21.200. Local Control.

(a) The department may authorize a political subdivision to exercise control over outdoor signs in its jurisdiction. If the political subdivision receives approval under this section, it will be listed as a certified city and a permit issued by that political subdivision is acceptable instead of a permit issued by the department within the approved area.

(b) To be considered for authorization under this section, the political subdivision must submit to the department:

(1) a copy of its sign regulations;

(2) a copy of its zoning regulations;

(3) information about the number of personnel who will be dedicated to the program and what type of records will be maintained, including whether the political subdivision maintains an inventory of signs that can be provided to the department in an electronic format that is acceptable to the department; and

(4) an enforcement plan that includes the removal of illegal signs.

(c) The department, after consulting with the Federal Highway Administration, shall determine whether a political subdivision has established and will enforce within its corporate limits standards and criteria for size, lighting, and spacing of outdoor signs consistent with the purposes of the Highway Beautification Act of 1965, 23 United States Code §131, and with customary use. The size, lighting, and spacing requirements of the political subdivision may be more or less restrictive than the requirements of this subchapter as long as the requirements comply with the federal requirements, such as the prohibition of signs over 1,200 square feet in size and spacing of less than 500 feet. The authorization does not include the area in a municipality's extraterritorial jurisdiction.

(d) The department may meet with a political subdivision to ensure that it is enforcing the standards and criteria in accordance with subsection (c) of this section.

(e) After approval under this section, the political subdivision shall:

(1) provide to the department:

(A) a copy of each amendment to its sign and zoning regulations when the amendment is proposed and adopted; and

(B) a copy of any change to its corporate limits and its extraterritorial jurisdiction, if covered by the approval;

(2) annually provide to the department:

(A) an electronic copy of the sign inventory; and

(B) report of the number of sign permits issued and the status of all pending enforcement actions; and

(3) participate in at least one video conference or teleconference sponsored by the department each year.

(f) The political subdivision may:

(1) set and retain the fees for issuing a sign permit; and

(2) establish the period for which a sign permit is effective.

(g) The department will conduct an on-site compliance monitoring review every two years.

(h) The department may withdraw the approval of a political subdivision given under this section if the department determines that the political subdivision does not have an effective sign control program. The department will consider whether:

(1) the standards and criteria of political subdivision's sign regulations continue to meet the requirements of subsection (c) of this section;

(2) the political subdivision maintains an accurate sign inventory and annually provides the inventory to the department in an electronic format; and

(3) the political subdivision enforces the sign regulations and annually reports enforcement actions as required.

(i) The department may reinstate a political subdivision's authority on the showing of a new plan that meets the requirements of subsection (c) of this section.

§21.201. Fees Nonrefundable.

A fee paid to the department under this subchapter is nonrefundable.

§21.202. Property Right Not Created.

Issuance of a permit or license under this subchapter does not create a contract or property right in the permit or license holder.

§21.203. Complaint Procedures.

(a) The department will accept and investigate all written complaints on a specific sign structure, sign company, or any other issue under the jurisdiction of the outdoor advertising program.

(b) The complaints can be filed via the department's website or by mail.

(c) If the complaint involves a sign structure or a sign company the department will notify the owner of the sign structure or sign company of the complaint and the pending investigation within 15 days of receipt of the complaint. This notification will include a copy of the complaint and complaint investigation procedures.

(d) If the complaint included contact information, the department will provide the complainant with a copy of the complaint procedures within 15 days of the receipt of the complaint.

(e) If the complaint involves fewer than 10 sign structures the department will investigate the complaint and make a finding within 30 days of the receipt of the complaint. If the complaint involves 10 or

more sign structures or is an investigation of a sign company or other outdoor advertising matter the department will make a finding within 90 days of the receipt of the complaint.

(f) If the department is unable to meet the deadlines in subsection (e) of this section, the department will notify the complainant, the sign owner, or sign company of the delay and will provide a date for the completion of the investigation.

(g) The department will provide the complainant, sign owner, or sign company the findings of the investigation, which will include whether administrative enforcement actions are being initiated.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 19, 2010.

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Bob Jackson
General Counsel
Texas Department of Transportation
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For further information, please call: (512) 463-8683

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SUBCHAPTER J. REGULATION OF ELECTRONIC SIGNS

43 TAC §§21.251 - 21.260

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §391.032, which provides authority to establish rules to regulate the orderly and effective display of outdoor advertising on primary roads; Transportation Code, §391.063, which provides authority for the commission to set fees for the issuance of an outdoor advertising license; Transportation Code, §391.065, which provides authority to establish rules to standardize forms and regulate the issuance of outdoor advertising licenses, Transportation Code; §394.004, which provides the commission with the authority to establish rules to regulate the erection and maintenance of signs on rural roads; and Transportation Code, §394.025, which provides authority for the commission to set fees for the issuance of an outdoor advertising license.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 391 and 394.

§21.251. Definition.

In this subchapter, "electronic sign" means a sign, display, or device that changes its message or copy by programmable electronic or mechanical processes.

§21.252. Department Determination.

The department has determined that the use of an electronic image on a digital display device is not the use of a flashing, intermittent, or moving light for the purposes of any rule, regulation, and standard promulgated by the department or any agreement between the department and the Secretary of the United States Department of Transportation.

§21.253. Issuance of Permit.

(a) The department will issue a permit for an electronic sign if the application for the permit:

(1) satisfies the requirements of this subchapter and Subchapter I of this chapter (relating to Regulation of Signs along Interstate and Primary Highways), as applicable; and

(2) has attached to it:

(A) a certified copy of the permit issued by the municipality that gives permission for the electronic sign; or

(B) if the municipality does not issue permits, a certified copy of written permission for the electronic sign from the municipality.

(b) A permit from the department is required for the erection of an electronic sign even if the requested sign location is within a city certified under §21.200 of this chapter (relating to Local Control).

§21.254. Prohibitions.

An electronic sign may not:

(1) be illuminated by flashing, intermittent, or moving lights;

(2) contain or display animated, moving video, or scrolling advertising;

(3) consist of a static image projected on a stationary object; or

(4) be a mobile sign located on a truck or trailer.

§21.255. Location.

(a) An electronic sign may be located, relocated, or upgraded only along a regulated highway and within:

(1) the corporate limits of a municipality that allows electronic signs under its sign or zoning ordinance; or

(2) within the extraterritorial jurisdiction of a municipality described by paragraph (1) of this subsection that under state law has extended its municipal regulation to include that area.

(b) Two electronic signs may be located on the same sign structure if each sign face is visible only from a different direction of travel. An electronic sign may not be located within 1,500 feet of another electronic sign on the same highway if facing the same direction of travel.

§21.256. Modification to Electronic Sign.

A sign may be modified to be an electronic sign if a new permit for the electronic sign is obtained from both the municipality in whose jurisdiction the sign is located and the department, except that lighting may not be added to or used to illuminate a nonconforming sign.

§21.257. Requirements.

(a) Each message on an electronic sign must be displayed for at least eight seconds. A change of message must be accomplished within two seconds and must occur simultaneously on the entire sign face.

(b) An electronic sign must:

(1) contain a default mechanism that freezes the sign in one position if a malfunction occurs; and

(2) automatically adjust the intensity of its display according to natural ambient light conditions.

(c) If the department finds that an electronic sign causes glare or otherwise impairs the vision of the driver of a motor vehicle or otherwise interferes with the operation of a motor vehicle, the owner of the sign, within 12 hours of a request by the department, shall reduce the intensity of the sign to a level acceptable to the department.

§21.258. Emergency Information.

The owner of an electronic sign shall coordinate with local authorities to display, when appropriate, emergency information important to the traveling public, such as Amber Alerts or alerts concerning terrorist attacks or natural disasters. Emergency information messages must remain in the advertising rotation according to the protocols of the agency that issues the information.

§21.259. Contact Information.

(a) The owner of an electronic sign shall provide to the department contact information for a person who is available to be contacted at any time and who is able to turn off the electronic sign promptly if a malfunction occurs or is able to accommodate an emergency notification request from a local authority under §21.258 of this subchapter (relating to Emergency Information).

(b) The department will share the contact information with the appropriate local authority that has jurisdiction over the location of the electronic sign.

§21.260. Application of Other Rules.

The requirements and other provisions of Subchapter I of this chapter (relating to Regulation of Signs along Interstate and Primary Highways) apply to an electronic sign, except that if this subchapter conflicts with a provision of Subchapter I of this chapter, this subchapter controls.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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General Counsel
Texas Department of Transportation
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SUBCHAPTER K. CONTROL OF SIGNS ALONG RURAL ROADS

43 TAC §§21.401, 21.411, 21.421, 21.431, 21.441, 21.451, 21.461, 21.471, 21.481, 21.491, 21.501, 21.511, 21.521, 21.531, 21.541, 21.542, 21.551, 21.561, 21.571, 21.572, 21.581

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Transportation or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

STATUTORY AUTHORITY

The repeals are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §391.032, which provides authority to establish rules to regulate the orderly and effective display of outdoor advertising on primary roads; Transportation Code, §391.063, which provides authority for the commission to set fees for the issuance of an outdoor advertising license; Transportation Code, §391.065, which provides authority to establish rules to standardize forms and regulate the issuance of outdoor advertising licenses, Transportation Code; §394.004, which provides the commission with the authority to establish rules to regulate the erection and maintenance of signs on rural roads; and Transportation Code, §394.025, which provides authority for the commission to set fees for the issuance of an outdoor advertising license.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 391 and 394.

§21.401. Purpose.
§21.411. Definitions.
§21.421. Exemptions.
§21.431. Registration of Existing Off-Premise Signs.
§21.441. Permit for Erection of Off-Premise Sign.
§21.451. Spacing Requirements.
§21.461. Height Restrictions.
§21.471. Face Restrictions.
§21.481. Multiple Faced Signs.
§21.491. Location of Signs.
§21.501. Number of On-Premise Signs.
§21.511. Replacement or Repair of Sign.
§21.521. On-Premise Sign Erectors.
§21.531. Board of Variance.
§21.541. Revocation of Permits.
§21.542. Administrative Penalties.
§21.551. Prohibited Signs.
§21.561. Removal of Sign.
§21.571. Discontinuance of Signs.
§21.572. Notice and Appeal.
§21.581. Property Right Not Created.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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43 TAC §§21.401 - 21.446

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §391.032, which provides authority to establish rules to regulate the orderly and effective display of outdoor advertising on primary roads; Transportation Code, §391.063, which provides authority for the commission to set fees for the issuance of an outdoor advertising license; Transportation Code, §391.065, which provides authority to establish rules to standardize forms and regulate the issuance of outdoor advertising licenses; Transportation Code, §394.004, which provides the commission with the authority to establish rules to regulate the erection and maintenance of signs on rural roads; and Transportation Code, §394.025, which provides authority for the commission to set fees for the issuance of an outdoor advertising license.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 391 and 394.

§21.401. Purpose.

This subchapter is established to regulate the orderly and effective display of outdoor advertising along rural highways and roads located outside corporate limits of cities, towns, and villages.

§21.402. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Commission--The Texas Transportation Commission.

(2) Department--The Texas Department of Transportation.

(3) Erect--To construct, build, raise, assemble, place, affix, attach, embed, create, paint, draw, or in any way bring into being or establish.

(4) Main-traveled way--The through traffic lanes exclusive of frontage roads, auxiliary lanes, and ramps.

(5) Off-premise sign--A sign displaying advertising copy that pertains to a business, person, organization, activity, event, place, service, or product not principally located or primarily manufactured or sold on the premises on which the sign is located.

(6) Permit--The authorization granted for the erection of a sign, subject to this subchapter and Transportation Code, Chapter 394.

(7) Person--An individual, association, partnership, limited partnership, trust, corporation, or other legal entity.

(8) Portable sign--A sign designed to be mounted on a trailer, bench, wheeled carrier, or other non-motorized mobile structure or on skids or legs.

(9) Rural road--A road, street, way, highway, thoroughfare, or bridge that is located in an unincorporated area and is not privately owned or controlled, any part of which is open to the public for vehicular traffic, and over which the state or any of its political subdivisions have jurisdiction.

(10) Sign--A thing that is designed, intended, or used to advertise or inform, including a sign, display, light, device, figure, painting, drawing, message, plaque, placard, poster, billboard, logo, or symbol.

(11) Sign face--The part of the sign that contains the advertising or information contents and is distinguished from other parts of the sign and another sign face by borders or decorative trim. The term does not include a lighting fixture, apron, or catwalk unless it displays a part of the advertising or information contents of the sign.

(12) Sign structure--All of the interrelated parts and materials, such as beams, poles, braces, apron, catwalk, and stringers, that are used, designed to be used, or intended to be used to support or display a sign face.

§21.403. Prohibited Signs.

(a) A sign may not be erected or maintained on a tree or painted or drawn on a rock or other natural feature.

(b) A sign may not be erected or maintained within the right of way of a public roadway or an area that would be within the right of way if the right of way boundary lines were projected across an area of railroad right of way, utility right of way, or road right of way that is not owned by the state or a political subdivision.

(c) A sign may not be erected or maintained on a highway or part of a highway designated under Transportation Code, §391.252.

(d) A sign may not be erected or contain a display that imitates or resembles any official traffic sign, signal, or device.

§21.404. Permit Required.

A person may not erect or cause to be erected an off-premise sign, other than an exempt sign, that is visible from the main-traveled way of a rural road without first having obtained a permit under this subchapter.

§21.405. Exemptions.

The following are exempt from the requirements of this subchapter:

(1) a sign, the erection and maintenance of which is allowed under the highway beautification provisions of the Transportation Code, Chapter 391;

(2) a sign in existence before September 1, 1985, that was properly registered and maintains a valid registration under §21.407 of this subchapter (relating to Existing Off-Premise Signs);

(3) a sign that has as its purpose the protection of life and property;

(4) a directional or other official sign authorized by law, including a sign pertaining to a natural wonder or scenic or historic attraction;

(5) a sign or marker giving information about the location of an underground electric transmission line, telegraph or telephone property or facility, pipeline, public sewer, or waterline;

(6) a sign erected by a governmental entity;

(7) a sign erected solely for and relating to a public election, but only if:

(A) the sign is on private property;

(B) the sign is erected after the 91st day before the election and is removed before the 11th day after the election;

(C) the sign is constructed of lightweight material;

(D) the surface area of the sign is not larger than 50 square feet; and

(E) the sign is not visible from the main-traveled way of an interstate or federal-aid primary highway;

(8) an off-premise directional sign for a small business, as defined by Government Code, §2006.001, that is on private property and is no larger than 50 square feet;

(9) a sign that is required by the Railroad Commission of Texas at the principal entrance to or on each oil or gas producing property, well, tank, or measuring facility to identify or to locate the property, that is no larger in size than is necessary to comply with the Railroad Commission's regulations, and that has no advertising or information content other than the name or logo of the company and the necessary directions;

(10) a sign that shows only the name of a ranch on which livestock are raised or a farm on which crops are grown and the directions to, telephone number, or internet address of the ranch or farm and that has a sign face that does not exceed an area of 32 square feet; and

(11) a sign identifying the name of a recorded subdivision located at an entrance to the subdivision or on property owned by or assigned to the subdivision, home owners association, or other entity associated with the subdivision.

§21.406. Exemptions for Certain Populous Counties.

(a) This subchapter does not apply to an off-premise portable sign in an unincorporated area of a county with a population of 2.4 million or more, according to the most recent federal census, if the county either prohibits or regulates the location, height, size, anchoring, or use of such a portable sign.

(b) This subchapter does not apply to an on-premise sign in an unincorporated area of a county with a population of 2.4 million or more or a county that borders such a county if:

(1) the county has adopted an ordinance to regulate on-premise signs; or

(2) the commissioner's court of the county, by order, has authorized the commission to regulate on-premise signs in the unincorporated area of the county in accordance with a municipal or county regulation.

§21.407. Existing Off-Premise Signs.

(a) A sign that existed before September 1, 1985 and that was registered not later than December 30, 1985 does not require a permit issued under this subchapter as long as the registration remains valid.

(b) The sign registration is valid only for the location indicated on the original registration application and only for the sign described on that application.

(c) The sign registration must be renewed on or before January 1 of the year of its expiration.

(d) The registration will automatically terminate if:

(1) the sign is removed for any reason other than to change the advertising;

(2) the registration is not renewed; or

(3) the sign is replaced with another structure.

(e) To renew the registration, the holder must:

(1) file a written request, on the form prescribed by the department;

(2) submit a renewal fee of $10 per year for a period of up to five years; and

(3) display the registration number on the sign structure in numerals with a minimum height of two inches and a minimum width of one inch.

(f) The registration allows for routine and customary repairs and maintenance as provided under §21.434 of this subchapter (relating to Repair and Maintenance), but substantial changes are not authorized for existing signs. An amended permit under §21.423 of this subchapter (relating to Amended Permit) must be obtained prior to performing any customary repairs or maintenance.

(g) The owner of an off-premise sign that was in existence before September 1, 1985 and not duly registered or the registration for which was timely renewed shall remove the sign at the owner's expense upon written notification by the department, unless it is an exempt sign.

(h) The registration of a sign may be transferred upon filing with the department, on a form prescribed by the department, a request for the transfer and payment of the transfer fee.

§21.408. Continuance of Nonconforming Signs.

(a) Notwithstanding other provisions of this subchapter, the department will renew a permit for a nonconforming sign only if the sign structure:

(1) was lawful on the later of the date it was erected or became subject to the control of the department; and

(2) remains substantially the same as it was on the later of the date it was erected or became subject to the department's control.

(b) A nonconforming sign may not be:

(1) removed for any reason, other than a request by a governmental entity; or

(2) substantially changed, as described by §21.434 of this subchapter (relating to Repair and Maintenance).

§21.409. Permit Applications.

(a) To obtain a permit for a sign, a person must file an application in a form prescribed by the department. The application at a minimum must include:

(1) the complete name and address of the applicant;

(2) the original signature of the applicant;

(3) the proposed location and description of the sign;

(4) the complete legal name and address of the owner of the designated site;

(5) a statement of whether the requested sign is located within an incorporated city or a city's extraterritorial jurisdiction;

(6) the site owner's or the owner's authorized representative's signature on the application demonstrating consent to the erection and maintenance of the sign and right of entry onto the property of the sign location by the department or its agents;

(7) information that details how and the location from which the sign will be erected and maintained; and

(8) additional information the department considers necessary to determine eligibility.

(b) The application must be:

(1) notarized;

(2) filed with the department's division responsible for the Outdoor Advertising Program in Austin; and

(3) accompanied by the fee prescribed by §21.424 of this subchapter (relating to Permit Fees).

(c) The application must include a sketch that shows:

(1) the location of the poles of the sign structure;

(2) the exact location of the sign faces in relation to the sign structure;

(3) the means of access to the sign; and

(4) the distance from the buildings, landmarks, right of way line, other signs, and other distinguishable features of the landscape.

§21.410. Site Owner's Consent; Withdrawal.

(a) A site owner's consent to the erection and maintenance of the sign and access to the site by the department or its agent is provided with a permit application under §21.409 of this subchapter (relating to Permit Applications). The consent operates for the life of the lease or until the owner delivers to the department and the sign owner a written statement that permission for the maintenance or inspection by the department or its agents of the sign has been withdrawn and documentation showing that the lease allowing the sign has been terminated in accordance with the terms of the lease agreement or through a court order.

(b) If the sign owner provides documentation that the sign owner is disputing the lease termination in court, the department will not cancel the permit until a court order settling the dispute is delivered to the department.

§21.411. Applicant's Identification of Proposed Site.

(a) An applicant for a permit for a new sign must identify the proposed site of the sign by setting a stake or marking the concrete at the proposed location of the center pole of the sign structure or if there is no center pole, at each pole of the sign structure.

(b) At least two feet of a stake must be visible above the ground.

(c) A stake or marking may not be moved or removed until the application is denied or, if approved, until the sign has been erected.

§21.412. Permit Application Review.

(a) The department will consider permit applications in the order of the receipt of the applications.

(b) If an application is returned to an applicant because it is not complete or has incorrect information, the application loses its priority position.

(c) The department will hold an application that is for the same site as or a conflicting site with that of an application that the department previously received until the department makes a final decision on the previously received application or returns it to the applicant. For the purposes of this subsection, the date of a final decision on an application is:

(1) the date of the final decision on an appeal under §21.418 of this subchapter (relating to Appeal Process for Permit Denials); or

(2) if an appeal is not filed within the period provided by §21.418 of this subchapter, on the 21st day after the date the denial notice was received under §21.413 of this subchapter (relating to Decision on Application).

(d) The department will review the permit application for completeness and compliance with all requirements of this subchapter. Measurements will be taken at the site to determine if the sign placement meets the spacing and location requirements.

§21.413. Decision on Application.

(a) The department will make a decision on an application within 45 days of the date of receipt of the application. If the decision cannot be made within the 45 day period the department will notify the applicant of the delay providing the reason for the delay, and provide an estimate of when the decision will be made.

(b) If the application is approved, the department will issue a permit for the sign by sending a copy of the approved application and a sign permit plate to the applicant.

(c) If the application is not approved, the department will send a copy of the denied application and a notice that states the reason for the denial.

(d) If an application is denied, the department will notify the landowner identified on the permit application of the denial. The notice is for informational purposes only, and does not convey any rights to the landowner. The landowner may not appeal the denial unless the landowner is also the applicant.

§21.414. Sign Permit Plate.

(a) The sign owner shall securely attach the sign permit plate to the part of the sign structure that is nearest to the rural road and visible from the main-traveled way not later than the 30th day after the date that the sign is erected.

(b) The sign permit plate may not be removed from the sign.

(c) The sign permit plate must remain visible from the main-traveled way at all times.

(d) If a sign permit plate is lost or stolen or becomes illegible, the sign owner must submit to the department a request for a replacement plate in a form prescribed by the department accompanied by the replacement plate fee prescribed by §21.424 of this subchapter (relating to Permit Fees).

(e) Failure to apply for a replacement permit or attach the plate to the sign structure as required in subsection (a) of this section within 60 days of the date of written notification from the department that the permit plate is not visible or attached may result in an enforcement action under §21.425 or §21.426 of this subchapter (relating to Cancellation of Permit and Administrative Penalties, respectively).

§21.415. General Sign Location Requirements.

The department will not issue a permit under this subchapter unless the sign for which application is made is located along a roadway to which Transportation Code, Chapter 394 applies and is within 800 feet of a recognized commercial or industrial activity located on the same side of the roadway.

§21.416. Commercial or Industrial Activity.

(a) For the purposes of this subchapter, a commercial or industrial activity is an activity that:

(1) is customarily allowed only in a zoned commercial or industrial area; and

(2) is conducted in a permanent building or structure affixed to the real property that:

(A) has an indoor restroom, running water, functioning electrical connections, and permanent flooring, other than dirt, gravel, or sand;

(B) is visible from the traffic lanes of the main-traveled way;

(C) is not primarily used as a residence; and

(D) has at least 400 square feet of its interior floor space devoted to the activity.

(b) The following are not commercial or industrial activities:

(1) agricultural, forestry, ranching, grazing, farming, and related activities, including the operation of a temporary wayside fresh produce stand;

(2) an activity that is conducted only seasonally;

(3) an activity that has not been conducted at its present location for at least 180 days;

(4) an activity that is not conducted by at least one person who works for the business at the activity site for at least 25 hours per week on at least five days per week and for which the hours during which the activity is conducted are posted at the activity site;

(5) the operation or maintenance of:

(A) an outdoor advertising structure;

(B) a recreational facility, such as a campground, golf course, tennis court, wild animal park, or zoo, other than the related activities conducted in a building or structure that meets the requirements of subsection (a)(2) of this section and the parking facilities for that building or structure;

(C) an apartment house or residential condominium;

(D) a public or private preschool, secondary school, college, or university, other than a trade school or corporate training campus;

(E) a quarry or borrow pit, other than the related activities conducted in a building or structure that meets the requirements of subsection (a)(2) of this section and the parking facilities for that building or structure;

(F) a cemetery; or

(G) a place that is primarily used for worship;

(6) an activity that is conducted on a railroad right of way; and

(7) an activity that is created primarily or exclusively to qualify an area as an unzoned commercial or industrial area.

(c) For the purposes of this section, a building is not primarily used as a residence if more than 50 percent of the building's square footage is used solely for the business activity.

(d) A sign is not required to meet the requirements of subsection (a)(2)(C) (as clarified by subsection (c) of this section), (a)(2)(D), (b)(3), or (b)(4) of this section to maintain conforming status if the permit for the sign was issued before the effective date of this section.

§21.417. Erection and Maintenance from Private Property.

The department will not issue a permit for a sign unless it can be erected or maintained from private property.

§21.418. Appeal Process for Permit Denials.

(a) If a sign permit is denied, the applicant may file a request with the executive director for an appeal.

(b) The request for appeal must:

(1) be in writing;

(2) contain:

(A) a copy of the denied permit application;

(B) a statement of why the denial is believed to be in error; and

(C) evidence that supports the issuance of the application, such as drawings, surveys, or photographs; and

(3) be received within 20 days after the date the denial notice was received.

(c) The executive director or the executive director's designee, who may not be below the level of assistant executive director, will make a final determination on the appeal. If the final determination is that the permit is denied, the executive director or the executive director's designee will send the final determination to the applicant stating the reason for denial. If the final determination is that the application be approved, the department will issue the permit in accordance with §21.413 of this subchapter (relating to Decision on Application).

(d) If the executive director or the designee is unable to make a final determination on the appeal within the 90-day period under subsection (c) of this section, the department will notify the applicant by mail of the delay and provide an estimated time in which a final determination will be made.

§21.419. Board of Variance.

(a) A board of variance is established. The executive director shall appoint the members of the board. A majority of the members constitutes a quorum.

(b) The board of variance may make minor exceptions to this subchapter if the board determines that a substantial injustice would result unless the minor exceptions were granted. The board of variance may establish appropriate conditions and safeguards for granting the variance.

(c) The board of variance will meet and consider variance requests as needed.

(d) The board of variance will provide 10 days notice of the meeting to all applicants requesting a variance.

(e) An applicant may request a variance from the board of variance if the applicant believes that the applicant meets the requirements of subsection (b) of this section.

(f) The board of variance will consider evidence from all parties present at the meeting prior to making a determination on the requested variance.

§21.420. Permit Expiration.

(a) A permit is valid for one year.

(b) A permit automatically expires on the date that the sign for which the permit was issued is acquired by the state.

§21.421. Permit Renewals.

(a) To continue in effect, a permit must be renewed.

(b) A permit is eligible for renewal if the sign for which it was issued continues to meet all applicable requirements of this subchapter and Transportation Code, Chapter 394.

(c) To renew the permit, the permit holder must file with the department a written application in a form prescribed by the department accompanied by the applicable fees prescribed by §21.424 of this subchapter (relating to Permit Fees). The application must be received by the department before the 31st day after the date of the permit expiration.

(d) A permit may not be renewed if the sign for which it was issued is not erected before the first anniversary of the date the permit was issued.

§21.422. Transfer of Permit.

(a) A sign permit may be transferred only with the written approval of the department.

(b) To transfer one or more sign permits, the permit holder must send to the department a written request in a form prescribed by the department accompanied by the prescribed transfer fee prescribed by §21.424 of this subchapter (relating to Permit Fees).

(c) If the request is approved, the department will send to the transferor and to the transferee a copy of the approved permit transfer form.

(d) The department will not approve the transfer of a permit if cancellation of the permit is pending or has been abated awaiting the outcome of an administrative hearing.

§21.423. Amended Permit.

(a) To perform customary maintenance or to make substantial changes to the sign or sign structure under §21.434 of this subchapter (relating to Repair and Maintenance), a permit holder must submit an amended permit application.

(b) The amended permit application must be submitted on a form prescribed by the department that provides the information required under §21.409 of this subchapter (relating to Permit Applications) that is applicable to an amended permit and indicates the change from the information in the original application for the sign permit.

(c) The new sign face size, configuration, or location must meet all applicable requirements of this subchapter.

(d) The holder of a permit for a nonconforming sign may apply for an amended permit to perform eligible customary maintenance under §21.434 of this subchapter. An amended permit will not be issued for a substantial change, as described by §21.434(c) of this subchapter, to a nonconforming sign.

(e) Making a change to a sign that requires an amended permit without first obtaining an amended permit is a violation of this subchapter and will result in an administrative enforcement action.

(f) The department will make a decision on an amended permit application within 45 days of the date receipt of the amended permit application. If the decision cannot be made within the 45 day period the department will notify the applicant of the delay, provide the reason for the delay, and provide an estimate for when the decision will be made.

§21.424. Permit Fees.

(a) The amounts of the fees related to permits under this subchapter are:

(1) $100 for an original or amended permit for a sign;

(2) $75 for the renewal of a permit;

(3) $25 for the transfer of a permit up to a maximum of $2,500 for a single transaction regardless of the location of the sign; and

(4) $25 for a replacement sign permit plate.

(b) In addition to the $75 annual renewal fee, an additional late fee of $100 is required for a renewal of a permit that is received before the 31st day after the permit expiration date.

(c) A fee prescribed by this section is payable by check, cashier's check, or money order. If a check or money order is dishonored upon presentment, the permit, renewal, or transfer is void.

§21.425. Cancellation of Permit.

(a) The department will cancel a permit for a sign if the sign:

(1) is removed, unless the sign is removed and re-erected at the request of a political subdivision;

(2) is not maintained in accordance with this subchapter or Transportation Code, Chapter 394;

(3) is damaged beyond repair, as determined under §21.439 of this subchapter (relating to Discontinuance of Sign Due to Destruction);

(4) is abandoned, as determined under §21.427 of this subchapter (relating to Abandonment of Sign);

(5) is erected after the effective date of this section and is not built within 10 feet of the location described in the permit application or is built within ten feet of the location described in the permit application but at a location that does not meet all spacing requirements of this chapter or in accordance with the sketch or other assertions contained in the permit application;

(6) is repaired or altered without obtaining a required amended permit under §21.423 of this subchapter (relating to Amended Permit);

(7) is built by an applicant who uses false information on a material issue of the permit application;

(8) is erected, repaired, or maintained in violation of §21.441 of this subchapter (relating to Destruction of Vegetation and Access from Right of Way Prohibited);

(9) has been made more visible by the permit holder clearing vegetation from the highway right of way in violation of §21.441 of this subchapter;

(10) is in an unzoned commercial or industrial area and the department has evidence that an activity supporting the unzoned commercial or industrial area was created primarily or exclusively to qualify the area as an unzoned commercial or industrial area and that no business has been conducted at the activity site within one year; or

(11) does not have the permit plate properly attached under §21.414 of this subchapter (relating to Sign Permit Plate).

(b) Before initiating an enforcement action under this section, the department will notify a sign owner in writing of a violation of subsection (a)(5) or (11) of this section and will give the sign owner 60 days to correct the violation and provide proof of the correction to the department.

(c) Upon determination that a permit should be canceled, the department will mail a notice of cancellation to the address of the record license holder. The notice must state:

(1) the reason for the cancellation;

(2) the effective date of the cancellation;

(3) the right of the permit holder to request an administrative hearing on the cancellation; and

(4) the procedure for requesting a hearing and the period for filing the request.

(d) A request for an administrative hearing under this section must be in writing and delivered to the department within 20 days after the date that the notice of cancellation is received.

(e) If timely requested, an administrative hearing will be conducted in accordance with Chapter 1, Subchapter E of this title (relating to Procedures in Contested Case) and the cancellation will be abated until the cancellation is affirmed by order of the commission.

(f) A permit holder may voluntarily cancel a permit by submitting a request in writing after the sign for which the permit was issued

has been removed. Subsections (c) - (e) of this section do not apply to a permit voluntarily canceled under this subsection.

(g) The department will notify the landowner identified on the permit application of a cancellation enforcement action. The notice is for informational purposes only, and does not convey any rights to the landowner. The landowner may not appeal the cancellation unless the landowner is also the permit holder.

§21.426. Administrative Penalties.

(a) The department may impose administrative penalties against a person who intentionally violates Transportation Code, Chapter 394 or this subchapter.

(b) The amount of the administrative penalty may not exceed the maximum amount of a civil penalty that may be imposed under Transportation Code, §394.081 and will based on the following:

(1) $150 for a violation of a permit plate requirement under §21.414 of this section (relating to Sign Permit Plate);

(2) $250 for a violation of:

(A) a registration requirement of §21.407 of this section (relating to Existing Off-Premise Signs); or

(B) erecting the sign at the location other than the location specified on the application, except that if the actual sign location does not conform to all other requirements the department will seek cancellation of the permit;

(3) $500 for:

(A) maintaining or repairing the sign from the state right of way; or

(B) performing customary maintenance on any sign or substantial maintenance on a conforming sign without first obtaining an amended permit; or

(4) $1000 for erecting a sign from the right of way.

(c) In addition to the penalties assessed under subsection (b) of this section, the department may seek to recover the cost of repairing any damage to the right of way done by the sign owner or on the sign owner's behalf.

(d) Before initiating an enforcement action under this section, the department will notify the sign owner in writing of a violation of subsection (b)(1) or (2)(B) of this section and will give the sign owner 60 days to correct the violation and provide proof of the correction to the department.

(e) Upon determination to seek administrative penalties the department will mail a notice of the administrative penalties to the last known address of the permit holder. The notice must clearly state:

(1) the reasons for the administrative penalties;

(2) the amount of the administrative penalty; and

(3) the right of the holder of the permit to request an administrative hearing.

(f) A request for an administrative hearing under this section must be made in writing and delivered to the department within 20 days after the date of the receipt of the notice.

(g) If timely requested, an administrative hearing shall be conducted in accordance with Chapter 1, Subchapter E of this title (relating to Procedures in Contested Case), and the imposition of administrative penalties will be abated unless and until that action is affirmed by order of the commission.

§21.427. Abandonment of Sign.

(a) The department may consider a sign abandoned and cancel the sign's permit if:

(1) the sign face is blank or without legible advertising or copy for a period of 365 consecutive days or longer; or

(2) the sign needs to be repaired or is overgrown by trees or other vegetation.

(b) Small temporary signs, such as garage sale signs or campaign signs, that are attached to the structure do not constitute legible advertising or copy for the purpose of ending the period under subsection (a)(1) of this section.

(c) The department will not consider the payment of property taxes or the retention of a sign as a balance sheet asset in determining whether the sign permit should be canceled under this section.

(d) The department may initiate the cancellation process if the department has evidence that supports the fact that the sign face has been blank or has been without legible advertisement or copy for 365 days, such as photographs showing that, on at least four dates throughout the 365-day period, the sign was in the same condition or was degrading. Evidence is not required for each of the 365 days.

(e) If the location of the abandoned sign is allowed under this subchapter, the department may issue a permit for the sign site to anyone who submits an application that meets the requirements of this subchapter. The department will not issue a permit for an abandoned sign that is located in a place that does not meet the requirements of this subchapter.

(f) For the purposes of this section "copy" includes any advertisement that the sign is available for lease.

(g) A multi-face sign is not abandoned unless all sign faces may be considered abandoned under this section.

(h) Before initiating the cancellation process under this section, the department will provide notice to the sign owner and land owner as identified on the permit application of the abandonment determination and allow the sign owner 60 days to correct the issue.

§21.428. Sign Face Size and Positioning.

(a) An on-premise sign, other than an on-premise wall sign, may not be erected that has a face area exceeding 400 square feet, including cutouts but excluding uprights, trim, and apron.

(b) An off-premise sign face may not exceed:

(1) 672 square feet in area;

(2) 25 feet in height; and

(3) 60 feet in length.

(c) For the purposes of subsection (b) of this section, border and trim are included as part of the sign face.

(d) Notwithstanding the area limitation provided by subsection (b)(1) of this section, one or more temporary protrusions may be added to a sign, provided that:

(1) the sign face, including the protrusions, meets the height and length limitations of subsection (b) of this section;

(2) the area of the protrusion does not exceed 25 percent of the area indicated on the sign permit; and

(3) the sign face, including the area of the protrusions, does not exceed 807 square feet in area.

(e) The area is measured by the smallest square, rectangle, triangle, circle, or combination that encompasses the entire sign face.

(f) A sign may not be erected that has more than two faces fronting a particular direction of travel on the main-traveled way.

(g) A sign erected in a back-to-back or V-type configuration, may have only one face fronting a particular direction of travel.

(h) A sign face that exceeds 336 square feet in area, including cutouts, may not be stacked on or placed side by side with another sign face. Two sign faces may not be stacked or placed side by side if combined they exceed 672 square feet in area.

(i) A sign face may consist of commercial electronic variable message signs (CEVMS), otherwise referred to as rotating slat signs or tri-vision signs, provided that the rotation is completed within one second and the message is stationary for at least 10 seconds following a rotation.

(j) If a sign is built with a smaller face than the size shown on the permit application or if the face is reduced in size after it is built, an amended permit will be required to increase the size of the face.

§21.429. Spacing of Signs.

(a) An off-premise sign having a sign face area of at least 301 square feet may not be located within 1,500 feet of another off-premise sign on the same side of the roadway.

(b) An off-premise sign having a sign face area of at least 100 but less than 301 square feet may not be located within 500 feet of another off-premise sign having a sign face within that range or within 1500 feet of an off-premise sign that has a sign face of at least 301 square feet and is on the same side of the roadway.

(c) An off-premise sign having a face area of less than 100 square feet may not be located within 150 feet of another off-premise sign having a sign face of less than 100 square feet, within 500 feet of a sign with a face area of at least 100 but less than 301 square feet, or within 1500 feet of an off-premise sign with a face area of at least 301 square feet that is on the same side of the roadway.

(d) Two signs located at the same intersection do not violate this section if they:

(1) are located so that their messages are not directed toward traffic flowing in the same direction; and

(2) are not visible from the main-traveled way of an interstate or federal-aid primary highway.

(e) For the purposes of this section, the space between signs is measured between points along the right of way of the roadway perpendicular to the center of the signs.

(f) The spacing requirements of this section do not apply to signs separated by buildings, natural surroundings, or other obstructions in a manner that causes only one of the signs to be visible within the specified spacing area.

(g) An off-premise sign may not be erected within five feet of a rural road right-of-way line.

(h) An off-premise sign must be erected within 800 feet of at least one recognized commercial or industrial activity. The commercial or industrial activity must be on the same side of the rural road as the sign.

(i) Distance from the commercial or industrial activity is measured from the outer edges of the regularly used buildings, parking lots, storage facilities, or processing areas of the commercial or industrial activity. Measurements are not made from the property line unless the property lines coincide with the regularly used portions of the activity.

(j) A sign may not be located in a place that creates a safety hazard, including a location that:

(1) is likely to cause a driver to be unduly distracted;

(2) obscures or interferes with the effectiveness of an official traffic sign, signal, or device; or

(3) obstructs or interferes with the driver's view of approaching, merging, or intersecting roadway or rail traffic.

(k) A sign may not be located in an area that is adjacent to or within 1,000 feet of a rest area, an interchange, or intersection at grade.

(l) The distance from a rest area is measured along the right of way line from the outer edges of the rest area boundary abutting the right of way.

(m) The center of a sign may not be located within 250 feet of the nearest point of the boundary of a public park.

(n) This subsection applies only if a public park boundary abuts the right of way of a regulated highway. A sign may not be located within 1,500 feet of the boundary of the public park, as measured along the right of way line from the nearest common point of the park's boundary and the right of way. This limitation applies on both sides of the rural road.

§21.430. Multiple Faced Signs.

(a) For spacing purposes, multiple faced off-premise signs under common ownership, whether double-faced, back-to-back, or of V-type construction, are considered to be one sign and the combined face area of the signs will be used to determine spacing requirements provided the sign faces are:

(1) physically contiguous;

(2) connected by the same structure or by cross-bracing; or

(3) located not more than 15 feet apart at their nearest point.

(b) For computing sign face area under §21.428 of this subchapter (relating to Sign Face Size and Positioning) each sign face of a double-faced, back-to-back, or V-type sign is considered to be a separate sign.

(c) If a nonconforming sign has two sign faces fronting the same direction of travel, the sign face area of both signs will be used to determine the sign spacing requirements.

§21.431. Wind Load Pressure.

An application for new sign permit or a permit renewal must include a certification signed by the applicant that the proposed or existing sign will withstand wind load pressures in pounds per square foot as set out in the following table.

Figure: 43 TAC §21.431

§21.432. Height Restrictions.

(a) A sign may not be erected that exceeds an overall height of 42-1/2 feet.

(b) A roof sign that has a solid sign face surface may not at any point exceed 24 feet above the roof level.

(c) A roof sign that has an open sign face in which the uniform open area between individual letter or shapes is not less than 40 percent of the total gross area of the sign face may not at any point exceed 40 feet above the roof level.

(d) The lowest point of a projecting roof sign or a wall sign must be at least 14 feet above grade.

(e) For the purposes of this section, height is measured from the grade level of the centerline of the main-traveled way closest to the sign, at a point perpendicular to the sign location.

§21.433. Lighting.

(a) A sign may not contain or be illuminated by any flashing, intermittent, or moving light except that this subsection does not apply to a sign that only provides public service information, such as time, date, temperature, or weather.

(b) Except for a relocated sign, any new sign may be illuminated but only by:

(1) upward lighting of no more than four luminaries per direction of the sign face or faces of the structure; or

(2) downward lighting of no more than four luminaries per direction of the sign face or faces of the structure.

(c) Lights that are a part of or illuminate a sign:

(1) must be shielded, directed, and positioned to prevent beams or rays of light from being directed at any portion of the traveled ways of a regulated rural road;

(2) may not be of such intensity or brilliance as to cause vision impairment of a driver of any motor vehicle on a regulated rural road or otherwise interfere with the driver's operation of a motor vehicle; and

(3) may not obscure or interfere with the effectiveness of an official traffic sign, device, or signal.

(d) A temporary protrusion on a sign may be animated only if it does not create a safety hazard to the traveling public. A temporary protrusion may not be illuminated by flashing or moving lights or enhanced by reflective material that creates the illusion of flashing or moving lights.

(e) Reflective paint or reflective disks may be used on a sign face only if the paint or disks do not:

(1) create the illusion of flashing or moving lights; or

(2) cause an undue distraction to the traveling public.

(f) A neon light may be used on a sign face only if:

(1) the light does not flash;

(2) the light does not cause an undue distraction to the traveling public; and

(3) the permit for the sign specifies that the sign is an illuminated sign.

(g) This subchapter does not prohibit a temporary protrusion that displays only alphabetical or numerical characters and that satisfies this subsection and the requirements of §21.428 of this subchapter (relating to Sign Face Size and Positioning) relating to a temporary protrusion. The display on the temporary protrusion may be a digital or other electronic display, but if so:

(1) it must consist of a stationary image;

(2) it may not change more frequently than twice in any 24 hour period; and

(3) the process of any change of display must be completed within one minute.

§21.434. Repair and Maintenance.

(a) The following are considered to be routine maintenance activities that do not require an amended permit:

(1) the replacement of nuts and bolts;

(2) nailing, riveting, or welding;

(3) cleaning and painting;

(4) manipulation of the sign structure to level or plumb it;

(5) changing of the advertising message; and

(6) the replacement of minor parts if the materials of the minor parts are the same type as those being replaced and the basic design or structure of the sign is not altered.

(b) The following are considered to be customary maintenance activities that may be made but require an amended permit prior to the initiation of such an activity:

(1) changing all or part of the sign face structure but only if materials similar to those of the sign face being replaced are used;

(2) upgrading existing lighting for an energy efficient lighting system;

(3) replacement of poles, but only if not more than one-half of the total number of poles of the sign structure are replaced in any 12 month period and the same material is used for the replacement poles; and

(4) adding a catwalk to the sign structure.

(c) The following are examples of substantial changes that may be made but require an amended permit application before the initiation of such an activity:

(1) adding lights to an unilluminated sign or adding more intense lighting to an illuminated sign whether or not the lights are attached to the sign structure;

(2) changing the number of poles in the sign structure;

(3) adding permanent bracing wires, guy wires, or other reinforcing devices;

(4) changing the material used in the construction of the sign structure, such as replacing wooden material with metal material;

(5) adding faces to a sign or changing the sign configuration;

(6) increasing the height of the sign;

(7) changing the configuration of the sign structure, such as changing a "V" sign to a stacked or back to back sign, or a single face sign to a back-to back sign; and

(8) moving the sign structure or sign face in any way unless the movement is made in accordance with §21.435 of this subchapter (relating to Permit for Relocation of Sign).

(d) To add a catwalk to a sign structure the catwalk must meet Occupational Safety and Health Administration guidelines.

§21.435. Permit for Relocation of Sign.

(a) A sign may be relocated in accordance with this section, §21.436 of this subchapter (relating to Location of Relocated Sign), and §21.437 of this subchapter (relating to Construction and Appearance of Relocated Sign) if the sign is legally erected and maintained and will be within the highway right of way as a result of a construction project.

(b) To relocate a sign under this section, the permit holder must obtain a new permit under §21.409 of this subchapter (relating to Permit Applications), but the permit fee is waived.

(c) To receive a new permit to relocate a sign, the permit holder must submit a new permit application that identifies that the applica-

tion is for the relocation of an existing sign due to a highway project. The new location must meet all local codes, ordinances, and applicable laws.

(d) Notwithstanding other provisions of this section, if only a part of a sign will be located within the highway right of way as a result of the construction project, the sign owner may apply to amend an existing permit for the sign to authorize:

(1) the relocation of the sign face of a monopole sign that would overhang the proposed right of way from that location to the land on which the sign's pole is located;

(2) the relocation of the poles and sign face of a multiple sign structure that are located in the proposed right of way from the proposed right of way to the land on which the other poles of the sign structure are located; or

(3) a reduction in the size of a sign structure that is located partially in the proposed right of way, so that the sign structure and sign face are removed from the proposed right of way.

(e) A permit for the relocation of a sign must be submitted within 18 months from the earlier of the date the original sign was removed or the date the original sign was required to move. Upon written request by the permit holder the department shall grant an additional six months to submit an application.

§21.436. Location of Relocated Sign.

(a) To receive a new permit for relocation, an existing sign must be relocated to one of the following locations, as listed in order of priority:

(1) on the same parcel of land on which the existing sign is located in a location that is allowed under this section and that is within 50 feet of a line drawn through the center point of the existing sign structure and perpendicular to the edge of the highway right of way nearest to the existing sign; or

(2) on a part of the same parcel of land on which the sign was situated before relocation in a location that is allowed under this section.

(b) If the sign owner can demonstrate that both of the locations under subsection (a) of this section are not physically or economically feasible for a sign structure, the sign owner, on approval by the department, may relocate the sign to any other location that is allowed under this section. The owner is not entitled to additional relocation benefits under §21.438 of this subchapter (relating to Relocation Benefits) if the sign structure is relocated further than 50 miles from the location of the existing sign.

(c) The location of the relocated sign must be within the required distance of a commercial or industrial activity as described by §21.416 of this subchapter (relating to Commercial or Industrial Activity).

(d) A sign may not be relocated to a place where it:

(1) is likely to cause a driver to be unduly distracted in any way;

(2) will obscure or otherwise interfere with the effectiveness of an official traffic sign, signal, or device; or

(3) will obstruct or interfere with the driver's view of approaching, merging, or intersecting motor vehicle or rail traffic.

(e) A sign may not be relocated from a rural road to a highway that is subject to Subchapter I of this chapter (relating to Regulation of Signs along Interstate and Primary Highways).

(f) Spacing requirements of §21.429(a) - (c) of this subchapter (relating to Spacing of Signs) apply to signs relocated under this section.

(g) A sign may not be relocated to a place that is:

(1) within 500 feet of a public park that is adjacent to a rural road on either side of the roadway;

(2) within 500 feet of an interchange, intersection at grade, or rest area; or

(3) within five feet of any highway right of way line.

§21.437. Construction and Appearance of Relocated Sign.

(a) A relocated sign must be constructed with the same number of poles and of the same type of materials as the existing sign. A relocated sign may not exceed the maximum height provided by §21.432 of this subchapter (relating to Height Restrictions). The number of sign faces and lighting, if any, of the relocated sign may not exceed the number of faces or lighting of the existing sign.

(b) The size of each of the sign faces of a relocated sign that are visible to approaching traffic may not exceed the size of the existing sign face.

(c) The sign faces of a relocated sign may be placed back-to-back, side-by-side, stacked, or in "V" type construction with not more than two displays facing any direction, except that if the area of a sign face exceeds 350 square feet, sign faces may not be stacked or placed side-by-side. The sign structure and sign faces are considered one sign.

§21.438. Relocation Benefits.

(a) Relocation benefits will be paid in accordance with Subchapter G of this chapter (relating to Relocation Assistance and Benefits) for the relocation of a sign under §21.435 of this subchapter (relating to Permit for Relocation of Sign).

(b) The owner of an existing sign that is being relocated must enter into a written agreement with the governmental entity that is acquiring the right-of-way in which the sign is located. In the agreement the owner, in consideration of the payment by the governmental entity of relocation benefits, waives and releases any claim for damages against the governmental entity and the state for any temporary or permanent taking of the sign.

§21.439. Discontinuance of Sign Due to Destruction.

(a) If a sign is partially destroyed by a natural force outside the control of the permit holder, including wind, tornado, lightening, flood, fire, or hurricane, the department will determine whether the sign can be repaired without an amended permit.

(b) The department may require the permit holder to submit an estimate of the proposed work, including an itemized list of the materials to be used and the manner in which the work will be done. The department will allow the sign to be repaired without an amended permit if the department determines that the damage is not substantial. If the damage is determined to be substantial the sign owner must obtain an amended permit under §21.423 of this subchapter (relating to Amended Permit).

(c) The department will cancel the existing permit if it determines the damage to the sign is substantial under subsection (g) of this section and an amended permit is not obtained by the sign owner within one year after the date that the department first became aware of the damage.

(d) If a permit is canceled under this section or §21.425 of this subchapter (relating to Cancellation of Permit) the remaining sign structure must be dismantled and removed without cost to the state.

(e) A sign that is totally or partially destroyed by vandalism or a motor vehicle accident may be rebuilt as described on the most recently approved permit application.

(f) If a decision to cancel a permit is appealed, the sign may not be repaired during the appeal process.

(g) Damage is considered to be substantial if the cost to repair the sign would exceed 50 percent of the cost to replace it with a sign of the same basic construction using new materials and at the same location.

§21.440. Order of Removal.

(a) If a sign permit expires without renewal or is canceled or if the sign is erected or maintained in violation of this subchapter, the owner of the sign, on a written demand by the department, shall remove the sign at no cost to the state.

(b) If the owner does not remove the sign within 30 days of the day that the demand for removal is sent, the department will remove the sign and will charge the sign owner for the cost of removal, including the cost of any court proceedings.

(c) The department will rescind a removal demand if the department determines the demand was issued incorrectly.

§21.441. Destruction of Vegetation and Access from Right of Way Prohibited.

(a) A person may not:

(1) destroy a tree or other vegetation on the right of way for any purpose related to this subchapter; or

(2) erect or maintain a sign from the right of way.

(b) The department will initiate an enforcement action if the permit holder, or someone acting on behalf of the permit holder, violates this section.

§21.442. On-Premise Signs.

(a) A business may not maintain more than five on-premise signs on a frontage of a single rural road at a single business location.

(b) A permit under 21.404 of this subchapter (relating to Permit Required) is not required to erect an on-premise sign.

(c) An on-premise sign is a sign that:

(1) is located on the real property of a business and consists only of:

(A) the name, logo, trademark, telephone number, and internet address of that business; or

(B) an identification of that business's principal and accessory products or services offered on the property; or

(2) only advertises the sale or lease of the real property on which the sign is located and is removed within 90 days after the date of the closing of the real property transaction.

(d) For the purposes of this section, a sign is located on the real property of a business if:

(1) the real property on which the sign is located and the real property on which the activity of the business is conducted are one contiguous tract that is under common ownership; or

(2) the sign is located on the real property of a commercial development and the businesses of the development share the sign structure of that sign.

(e) For the purpose of subsection (d)(1) of this section, real property is not considered to be a part of one contiguous tract if the real property on which the sign is located is:

(1) separated from the real property on which the business activity is located by a road or highway or by another business;

(2) devoted to a separate purpose unrelated to the advertised business activity;

(3) held under an easement or other lesser property interest than the property interest in the land on which the business activity is located; or

(4) is a narrow strip or other configuration of land that cannot be put to any reasonable use related to the advertised business activity other than for signing purposes.

(f) A sign is not an on-premise sign if:

(1) brand name or trade name advertising regarding a product or service that is only incidental to the business activity covers more than 50 percent of the area of a static sign face or for an electronic sign, as defined by §21.251 of this chapter (relating to Definition), if brand name or trade name advertising is displayed 50 percent or more of the time during any five minute period;

(2) the sign advertises activities that are not conducted on the premises; or

(3) the sign provides rental income to the owner of the real property on which it is located, unless the owner of the real property receives the income from an on-premise business for the use of the sign.

(g) For the purposes of this subsection:

(1) the date of the closing of a sales transaction is the date that legal title to a property is conveyed to a purchaser for property under a contract to buy; and

(2) the date of the closing of a lease transaction is the date that the landlord and tenant enter into a binding lease of a property.

§21.443. On-Premise Sign Erectors.

(a) Any person engaged primarily in the business of erecting signs that advertise companies located or products sold on the premises on which the signs are erected must file with the director of the right of way division on behalf of the commission a surety bond that is in the amount of at least $100,000 and payable to the commission to reimburse the department for the cost of removing a sign unlawfully erected or maintained by the person. The bond must be in a form prescribed by the department and must remain in effect at all times that the person remains primarily engaged in the business of erecting such a sign.

(b) If a person files with the department an affidavit that states that the person is not engaged primarily in the business of erecting on-premise signs, the statement in the affidavit will be accepted as factual unless probative evidence to the contrary is received by the department.

(c) A person may not be exempted from the bond requirement of this section.

§21.444. Fees Nonrefundable.

A fee paid to the department under this subchapter is nonrefundable.

§21.445. Property Right Not Created.

Issuance of a permit under this subchapter does not create a property right in the permit holder.

§21.446. Time Proposed Roadway Becomes Subject to Subchapter.

For the purposes of this subchapter, a proposed roadway becomes a roadway and a proposed interchange becomes an interchange:

(1) when environmental clearance and the approved alignment have been obtained from the Federal Highway Administration; or

(2) if environmental clearance and approved alignment from the Federal Highway Administration are not required for a proposed roadway, when the alignment is approved by the department or other political subdivision responsible for constructing the roadway.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 19, 2010.

TRD-201006616
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: January 2, 2011
For further information, please call: (512) 463-8683

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SUBCHAPTER Q. REGULATION OF DIRECTIONAL SIGNS

43 TAC §§21.941 - 21.947

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §391.032, which provides authority to establish rules to regulate the orderly and effective display of outdoor advertising on primary roads; Transportation Code, §391.063, which provides authority for the commission to set fees for the issuance of an outdoor advertising license; Transportation Code, §391.065, which provides authority to establish rules to standardize forms and regulate the issuance of outdoor advertising licenses, Transportation Code; §394.004, which provides the commission with the authority to establish rules to regulate the erection and maintenance of signs on rural roads; and Transportation Code, §394.025, which provides authority for the commission to set fees for the issuance of an outdoor advertising license.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 391 and 394.

§21.941. Description of Directional Sign.

A directional sign is a sign that contains only a message that identifies an attraction or activity that meets the requirements of this section and provides directional information, such as mileage, route number, or exit number, useful to the traveler in locating the attraction or activity. A directional sign may not contain descriptive words or phrases or pictorial or photographic representations of the activity or its environs.

§21.942. Requirements for Erection and Maintenance of Sign.

(a) Before a person may erect a directional sign, the person must obtain the approval of the department. A license or permit issued under Subchapter I or Subchapter K of this chapter (relating to Regulation of Signs along Interstate and Primary Highways and Control of Signs along Rural Roads, respectively) is not required for the erection or maintenance of a directional sign.

(b) To obtain the approval the person must file an application on a form prescribed by the department that shows the location, message content, construction, and dimensions of the sign.

(c) No fee is required for the application or approval.

§21.943. Eligibility.

(a) To be eligible for a directional sign, a privately owned activity or attraction must be of national or regional interest to the traveling public and must be:

(1) a natural phenomenon;

(2) a scenic attraction;

(3) an historic, educational, cultural, scientific, or religious site; or

(4) an outdoor recreational area.

(b) The department may determine whether an attraction or activity satisfies the requirements of subsection (a) of this section. In making the determination the department may use among other resources the National Register of Historic Places and the "Texas State Travel Guide" published by the State of Texas.

§21.944. Size of Sign.

A sign, including its border and trim but excluding its supports, may not exceed:

(1) an area of 150 square feet;

(2) a height of 20 feet; or

(3) a length of 20 feet.

§21.945. Condition of Sign.

(a) A directional sign must be structurally safe and maintained in good repair.

(b) A directional sign may not be obsolete.

(c) A directional sign may not move or have animated or moving parts.

§21.946. Location and Spacing.

(a) A directional sign may not be located within 2,000 feet of:

(1) an interchange or intersection at grade along the interstate system or other primary system, as measured from the nearest point of the beginning, ending, or pavement widening at the exit from or entrance to the main-traveled way; or

(2) a rest area, park, or scenic area.

(b) A directional sign may not:

(1) obscure or otherwise interfere with the effectiveness of an official traffic sign, signal, or device;

(2) obstruct or interfere with a driver's view of approaching, merging, or intersecting traffic;

(3) be erected on a tree or painted or drawn on a rock or other natural feature; or

(4) be located in a rest area, parkland, or scenic area.

(c) Two directional signs facing the same direction of travel may not be spaced less than one mile apart.

(d) Not more than three directional signs relating to the same attraction or activity and facing the same direction of travel may be erected along a single route approaching the attraction or activity.

(e) A directional sign located adjacent to the interstate highway system must be within 75 air miles of the attraction or activity. A

sign located adjacent to the primary highway system must be within 50 air miles of the attraction or activity.

§21.947. Lighting of Sign.

(a) A directional sign may not contain, include, or be illuminated by flashing, intermittent, or moving lights.

(b) Lights that are a part of or illuminate a directional sign:

(1) must be shielded so that beams or rays of light are not being directed at any portion of the traveled way of an interstate or primary highway; and

(2) may not be of such intensity or brilliance that they:

(A) impair the vision of the driver of a motor vehicle on an interstate or primary highway or otherwise interfere with the driver's operation of the motor vehicle; or

(B) obscure or interfere with the effectiveness of an official traffic sign, device, or signal.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 19, 2010.

TRD-201006617
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: January 2, 2011
For further information, please call: (512) 463-8683

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WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 35. PRIVATE SECURITY

SUBCHAPTER F. ADMINISTRATIVE HEARINGS

37 TAC §35.93

The Texas Department of Public Safety withdraws the proposed amendment to §35.93 which appeared in the July 2, 2010, issue of the *Texas Register* (35 TexReg 5795).

Filed with the Office of the Secretary of State on November 19, 2010.

TRD-201006648
Duncan R. Fox
Interim General Counsel
Texas Department of Public Safety
Effective date: November 19, 2010
For further information, please call: (512) 424-5848

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SUBCHAPTER L. GENERAL REGISTRATION REQUIREMENTS

37 TAC §35.181

The Texas Department of Public Safety withdraws the proposed amendment to §35.181 which appeared in the July 2, 2010, issue of the *Texas Register* (35 TexReg 5796).

Filed with the Office of the Secretary of State on November 19, 2010.

TRD-201006649
Duncan R. Fox
Interim General Counsel
Texas Department of Public Safety
Effective date: November 19, 2010
For further information, please call: (512) 424-5848

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SUBCHAPTER S. CONTINUING EDUCATION

37 TAC §35.292

The Texas Department of Public Safety withdraws the proposed amendment to §35.292 which appeared in the July 2, 2010, issue of the *Texas Register* (35 TexReg 5797).

Filed with the Office of the Secretary of State on November 19, 2010.

TRD-201006647
Duncan R. Fox
Interim General Counsel
Texas Department of Public Safety
Effective date: November 19, 2010
For further information, please call: (512) 424-5848

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 1. ADMINISTRATION

SUBCHAPTER B. UNDERWRITING, MARKET ANALYSIS, APPRAISAL, ENVIRONMENTAL SITE ASSESSMENT, PROPERTY CONDITION ASSESSMENT, AND RESERVE FOR REPLACEMENT RULES AND GUIDELINES

10 TAC §§1.31 - 1.37

The Texas Department of Housing and Community Affairs (the "Department") adopts the repeal of 10 TAC Chapter 1, Subchapter B, §§1.31 - 1.37, concerning the General Provisions, Underwriting Rules and Guidelines, Market Analysis Rules and Guidelines, Appraisal Rules and Guidelines, Environmental Site Assessment Rules and Guidelines, Property Condition Assessment Guidelines, and Reserve for Replacement Rules and Guidelines, without changes to the proposal as published in the September 24, 2010, issue of the *Texas Register* (35 TexReg 8565).

Public hearings to receive input on the proposed rules were held from September 29, 2010 to October 15, 2010 and written comments on the proposed repeal were accepted by mail, e-mail, and facsimile from September 24, 2010 to October 23, 2010.

No comments were received concerning the proposed repeal.

The Board approved the final order adopting this repeal on November 10, 2010.

The repeal of these sections is adopted pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 19, 2010.

TRD-201006643

Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Effective date: December 9, 2010
Proposal publication date: September 24, 2010
For further information, please call: (512) 475-3916

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10 TAC §§1.31 - 1.37

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 1, Subchapter B, §§1.31 - 1.37, concerning the General Provisions, Underwriting Rules and Guidelines, Market Analysis Rules and Guidelines, Appraisal Rules and Guidelines, Environmental Site Assessment Rules and Guidelines, Property Condition Assessment Guidelines, and Reserve for Replacement Rules and Guidelines. Section 1.31 is adopted with changes to text as published in the *Texas Register* (35 TexReg 8565). Sections 1.32 - 1.37 are adopted without changes and will not be republished.

Public hearings to receive input on the proposed rules were held from September 29, 2010 to October 15, 2010 and written comments were accepted by mail, e-mail, and facsimile from September 24, 2010 to October 23, 2010.

REASONED RESPONSE TO PUBLIC COMMENT ON THE PROPOSED ADOPTION OF 10 TAC CHAPTER 1, SUBCHAPTER B, §§1.31 - 1.37, GENERAL PROVISIONS, UNDERWRITING RULES AND GUIDELINES, MARKET ANALYSIS RULES AND GUIDELINES, APPRAISAL RULES AND GUIDELINES, ENVIRONMENTAL SITE ASSESSMENT RULES AND GUIDELINES, PROPERTY CONDITION ASSESSMENT GUIDELINES, AND RESERVE FOR REPLACEMENT RULES AND GUIDELINES.

Comments were received from Bill Fisher of Odyssey Residential at the Brownsville public hearing.

§1.31(b)(9). Definitions, Development.

STAFF RECOMMENDATION: To conform with amended definitions in Chapter 49, staff recommends deleting of the definition of Development and renumbering, as appropriate.

§1.31(b)(32). Definitions, Supportive Housing.

STAFF RECOMMENDATION: To conform with amended definitions in Chapter 49, staff recommends amending the definition of Supportive Housing, renumbered as appropriate, as follows:

(31) Supportive Housing--Residential rental developments intended for occupancy by individuals or households in need of specialized and specific non-medical services in order to maintain independent living.

§1.33(d)(10)(E). Market Analysis Rules and Guidelines, Demand. (Bill Fisher)

COMMENT: Commenter suggested that households with housing authority vouchers are not being appropriately accounted for in the Department's Capture Rate Analysis.

STAFF RESPONSE: The Real Estate Analysis Rules regarding demand include a category called "Demand from Other Sources." The definition of this category specifically discusses Section 8 vouchers as a source of demand, and specifies the information that must be provided by the Market Analyst to quantify this demand. If the Market Study presents voucher holders as a source of demand, the Underwriter includes this source in the analysis. Staff recommends no change based on this comment.

The Board approved the final order adopting the new sections on November 10, 2010.

The new sections are adopted pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

§1.31. General Provisions.

(a) Purpose. The rules in this subchapter apply to the underwriting, market analysis, appraisal, environmental site assessment, property condition assessment, and reserve for replacement standards employed by the Texas Department of Housing and Community Affairs (the "Department" or "TDHCA"). This chapter provides rules for the underwriting review of an affordable housing development's financial feasibility and economic viability that ensures the most efficient allocation of resources while promoting and preserving the public interest in ensuring the long-term health of the Department's portfolio. In addition, this chapter guides the underwriting staff in making recommendations to the Executive Award and Review Advisory Committee (the "Committee"), Executive Director, and TDHCA Governing Board (the "Board") to help ensure procedural consistency in the determination of Development feasibility (§2306.0661(f) and §2306.6710(d), Texas Government Code). Due to the unique characteristics of each development the interpretation of the rules and guidelines described in this subchapter is subject to the discretion of the Department and final determination by the Board.

(b) Definitions. Terms used in this subchapter that are also defined in Chapter 49 of this title (relating to the 2011 Department's Housing Tax Credit Program Qualified Allocation Plan and Rules, known as the "QAP") have the same meaning as in the QAP. Those terms that are not defined in the QAP or which may have another meaning when used in this subchapter, shall have the meanings set forth in §1.32(b) of this subchapter (relating to Underwriting Rules and Guidelines) and §1.1 of this title (relating to Definitions for Housing Program Activities).

(1) Affordable Housing--Housing that has been funded through one or more of the Department's programs or other local, state or federal programs or has at least one unit that is restricted in the rent that can be charged either by a Land Use Restriction Agreement or other form of Deed Restriction.

(2) Bank Trustee--A bank authorized to do business in this state, with the power to act as trustee.

(3) Breakeven Occupancy--The occupancy level at which rental income plus secondary income is equal to all operating expenses, including replacement reserves and taxes, and mandatory debt service requirements for a Development.

(4) Cash Flow--The funds available from operations after all expenses and debt service required to be paid has been considered.

(5) Comparable Unit--A Unit, when compared to the subject Unit, similar in overall condition, location, unit amenities, utility structure, and common amenities; and

(A) for purposes of calculating the inclusive capture rate, targets the same population and is likely to draw from the same demand pool;

(B) for purposes of estimating the Restricted Market Rent targets the same population and is similar in net rentable square footage and number of bedrooms; or

(C) for purposes of estimating the subject Unit market rent does not have any income or rent restrictions and is similar in net rentable square footage and number of bedrooms.

(6) Contract Rent--Maximum rent limits based upon current and executed rental assistance contract(s), typically with a federal, state or local governmental agency.

(7) Credit Underwriting Analysis Report--Sometimes referred to as the "Report." A decision making tool used by the Department and Board containing a synopsis and reconciliation of the application information submitted by the Applicant.

(8) Debt Coverage Ratio (DCR)--Sometimes referred to as the "Debt Coverage" or "Debt Service Coverage." A measure of the number of times loan principal and interest are covered by Net Operating Income.

(9) Effective Gross Income (EGI)--The sum total of all sources of anticipated or actual income for a rental Development less vacancy and collection loss, leasing concessions, and rental income from employee-occupied units that is not anticipated to be charged or collected.

(10) Eligible Hard Costs--Hard Costs includable in Eligible Basis for the purposes of determining a Housing Tax Credit Allocation.

(11) Environmental Site Assessment (ESA)--An environmental report that conforms with the Standard Practice for Environmental Site Assessments: Phase I Assessment Process (ASTM Standard Designation: E 1527) and conducted in accordance with §1.35 of this subchapter (relating to Environmental Site Assessment Rules and Guidelines) as it relates to a specific Development.

(12) First Lien Lender--A lender whose lien has first priority.

(13) Gross Capture Rate--The Gross Capture Rate is defined as the Relevant Supply divided by the Gross Demand.

(14) Gross Demand--The sum of Potential Demand from the Primary Market (PMA), demand from other sources, and Potential Demand from a Secondary Market Area (SMA) to the extent that SMA demand does not exceed 25% of Gross Demand.

(15) Gross Program Rent--Sometimes called the "Program Rents." Maximum rent limits based upon the tables promulgated by the Department's division responsible for compliance which are developed by program and by county or Metropolitan Statistical Area ("MSA") or Primary Metropolitan Statistical Area ("PMSA") or national non-metro area.

(16) Hard Costs--The sum total of direct construction costs, site work costs, off-site costs and contingency.

(17) Market Analysis--Sometimes referred to as "Market Study." An evaluation of the economic conditions of supply, demand and rental rates or pricing conducted in accordance with §1.33 of this subchapter (relating to Market Analysis Rules and Guidelines) as it relates to a specific Development.

(18) Market Analyst--Any person who prepares a market study.

(19) Market Rent--The rent concluded by the Market Analyst for a particular unit type and size after adjustments are made to rents charged by owners of Comparable Units on properties without rent and income restrictions.

(20) Net Operating Income (NOI)--The income remaining after all operating expenses, including replacement reserves and taxes have been paid.

(21) Potential Demand--The number of income-eligible, age-, size-, and tenure-appropriate target households in the designated market area at the proposed placement in service date.

(22) Primary Market--Sometimes referred to as "Primary Market Area" or "PMA." The area defined by the Qualified Market Analyst as described in §1.33(d)(9) of this subchapter from which a proposed or existing Development is most likely to draw the majority of its prospective tenants or homebuyers.

(23) Property Condition Assessment--Sometimes referred to as "PCA," "Physical Needs Assessment," "Project Capital Needs Assessment," or "Property Condition Report." The PCA provides an evaluation of the physical condition of an existing property to evaluate the immediate cost to rehabilitate and to determine costs of future capital improvements to maintain the property. The PCA must be prepared in accordance with §1.36 of this subchapter (relating to Property Condition Assessment Rules and Guidelines) as it relates to a specific Development.

(24) Qualified Market Analyst--A real estate appraiser certified or licensed by the Texas Appraiser Licensing and Certification Board, a real estate consultant, or other professional currently active in the subject property's market area who demonstrates competency, expertise, and the ability to render a high quality written report. The individual's performance, experience, and educational background will provide the general basis for determining competency as a Market Analyst. Competency will be determined by the Department, in its sole discretion. The Qualified Market Analyst must be a Third Party.

(25) Relevant Supply--The relevant supply of proposed and unstabilized Comparable Units includes:

(A) The proposed subject Units;

(B) Comparable Units with priority over the subject, based on the Department's evaluation process described in §49.7(g) of this title (relating to Application Process), that have made application to TDHCA and have not been presented to the TDHCA Board for decision; and

(C) Comparable Units in previously approved but Unstabilized Developments in the Primary Market Area (PMA); and

(D) Comparable Units in previously approved but Unstabilized Developments in the Secondary Market Area (SMA), in the same proportion as the proportion of Potential Demand from the SMA that is included in Gross Demand.

(26) Rent Over-Burdened Households--Non-elderly households paying more than 35% of gross income towards total housing expenses (unit rent plus utilities) and elderly households paying more than 50% of gross income towards total housing expenses.

(27) Reserve Account--An individual account:

(A) Created to fund any necessary repairs for a multifamily rental housing development; and

(B) Maintained by a First Lien Lender or Bank Trustee.

(28) Restricted Market Rent--The restricted rent concluded by the Qualified Market Analyst for a particular unit type and size after adjustments are made to rents charged by owners of Comparable Units on properties with the same rent and income restrictions.

(29) Secondary Market--Sometimes referred to as "Secondary Market Area." The area defined by the Qualified Market Analyst as described in §1.33(d)(8) of this subchapter.

(30) Sub-Market--An area defined by the Underwriter based on general overall market segmentation promulgated by market data tracking and reporting services from which a proposed or existing Development is most likely to draw the majority of its prospective tenants or homebuyers.

(31) Supportive Housing--Residential rental developments intended for occupancy by individuals or households in need of specialized and specific non-medical services in order to maintain independent living.

(32) TDHCA Operating Expense Database--Sometimes referred to as "TDHCA Database." A consolidation of recent actual operating expense information collected through the Department's Annual Owner Financial Certification process, as required and described in Chapter 60, Subchapter A of this title (relating to Compliance Monitoring), and published on the Department's web site.

(33) Underwriter--The author(s) of the Credit Underwriting Analysis Report.

(34) Unstabilized Development--A Development with Comparable Units that has been approved for funding by the TDHCA Board or is currently under construction or has not maintained a 90% occupancy level for at least twelve (12) consecutive months following construction completion.

(35) Utility Allowance--The estimate of tenant-paid utilities, based either on the most current HUD Form 52667, "Section 8, Existing Housing Allowance for Tenant-Furnished Utilities and Other Services," provided by the local entity responsible for administering the HUD Section 8 program with most direct jurisdiction over the majority of the buildings existing, a documented estimate from the utility provider proposed in the Application, or for an existing development an allowance calculated by the Department pursuant to §60.109 of this title (relating to Utility Allowances). Documentation from the local utility provider to support an alternative calculation can be used to justify alternative Utility Allowance conclusions but must be specific to the subject development and consistent with the building plans provided.

(36) Work Out Development--A financially distressed Development seeking a change in the terms of Department funding or program restrictions based upon market changes.

(c) Appeals. Certain programs contain express appeal options. Where not indicated, §1.7 of this chapter (relating to Staff Appeals Process) and §1.8 of this chapter (relating to Board Appeals Process) include general appeal procedures. In addition, the Department encourages the use of §1.17 of this chapter (relating to Alternative Dispute Resolution (ADR) methods).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 19, 2010.

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Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3916

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CHAPTER 5. COMMUNITY AFFAIRS PROGRAMS

SUBCHAPTER A. GENERAL PROVISIONS

10 TAC §5.16

The Texas Department of Housing and Community Affairs (the "Department") adopts amendments to 10 TAC Chapter 5, Subchapter A, §5.16, regulations related to Community Affairs Programs, without changes to the proposed text as published in the August 13, 2010, issue of the *Texas Register* (35 TexReg 6877) and will not be republished.

For the Weatherization Assistance Program, the purpose for the amendment is to clarify the requirement that the Department prepare and submit monitoring reports to Subrecipients within 30 days of the end of the monitoring review, and that Subrecipient responses to monitoring reports be prepared and submitted to the Department within thirty (30) calendar days from the date of the report.

Public comments were accepted through September 13, 2010. No comments were received regarding the proposed amendments.

The Board approved the final order adopting the amended section on November 10, 2010.

The amendments are adopted pursuant to the authority of the Texas Government Code Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3916

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SUBCHAPTER E. WEATHERIZATION ASSISTANCE PROGRAM GENERAL

10 TAC §5.516, §5.529

The Texas Department of Housing and Community Affairs (the "Department") adopts a new §5.516 and an amendment to §5.529 under 10 TAC Chapter 5, Subchapter E. New §5.516, Monitoring of WAP Subrecipients, is adopted without changes to the proposal as published in the August 13, 2010, issue of the *Texas Register* (35 TexReg 6878). The amendments to §5.529, Whole House Assessment, is adopted with changes and will be republished.

For the Weatherization Assistance Program, the changes clarify the requirement that the Department prepare and submit monitoring reports to Subrecipients within 30 days of the end of the monitoring review, and that Subrecipient responses to monitoring reports be prepared and submitted to the Department within thirty (30) calendar days from the date of the report; and adds a requirement that a whole house assessment be performed on all eligible housing units.

The Department received comments to the proposed amendments in writing by email. The Department's response to all comments received is included herein. The comments and responses include both administrative clarifications and corrections to the amendments recommended by staff and substantive comments on the amendments and the corresponding Departmental responses. Comments and responses are presented in the order they appear in the rules.

REASONED RESPONSE TO PUBLIC COMMENT. Public comments were accepted through September 13, 2010, with comments received from (1) Ms. Stella Rodriguez, Texas Association of Community Action Agencies. Staff has reviewed the comments and provided reasoned responses.

§5.529(a) and (b). Whole House Assessment. (1)

COMMENT SUMMARY: Commenter recommended language to clarify or include in the proposed amendment as presented to the Board in July:

Commenter suggested that all electric multifamily units be exempted from the whole house assessment requirement in subsection (a).

Commenter suggested language to clarify the following requirements:

(5) Foundation--condition, existing R-values and floor height above ground level.

(6) Heating System--unit type, fuel source (primary or secondary), vented or unvented efficiency, output, CO-levels, thermostat, complete fuel gas analysis, and gas leaks;

(7) Cooling System--unit type, condition, area cooled, size in BTU rating, Seasonal Energy Efficiency Rating (SEER) or Energy Efficiency Rating (EER), manufacture date and thermostat;

(8) Duct System--condition and existing insulation level, evaluation of registers, return air register size and condition and of plenum joints;

(9) Water Heater--Commenter suggested deleting the complete fuel gas analysis and other health and safety test from the requirement.

(10) Refrigerator--condition, manufacturer, manufacture date and make, model, and consumption reading (minutes and meter reading); client refusal must be documented (the style, size, height, width and depth is not needed for the assessment.)

(11) Lighting System--quantity, watts, and hours used per day;

(12) Water Savers--number of showerheads, estimated gallons per minute and estimated minutes used per day;

(13) Health and Safety--smoke detectors, carbon monoxide levels on all combustion appliances, wiring, minimum air exchange, moisture problems, lead paint present, asbestos siding present, condition of chimney, plumbing problems, mold, unvented space heaters, and other health and safety observations a subrecipient deems worth noting;

(14) Air Infiltration--to be determined from Blower Door testing, areas requiring air sealing will be noted;

(15) Repairs--measures needed to preserve or protect installed weatherization measures may include lumber, shingles, flashing, siding, masonry supplies, minor window repair, gutters, downspouts, paint, stains, sealants, and underpinning, if allowable by the program.

Commenter suggested adding the following language to clarify requirement:

(b) If not using the Priority List, all allowable weatherization measures needed to preserve or protect installed weatherization measures may include lumber, shingles, flashing, siding, masonry supplies, minor window repair, gutters, downspouts, paint, stains, and sealants, and underpinning, if allowable by the program.

STAFF RESPONSE: Staff believes that a whole house assessment must be completed for all eligible units and does not recommend that all electric multifamily units should be exempt from this requirement. The whole house assessment gives the Subrecipient all the information they need to determine if the Priority List or an Energy Audit is the most appropriate tool for determining needed weatherization measures. Staff agrees that some of the requirements listed in subsection (a)(1) - (15) may not be required for units that do not include combustion appliances and has made exceptions where applicable. Staff recommended the following language for this section based on administrative clarifications and the comments received.

(a) Subrecipients must conduct a whole house assessment on all eligible units. Whole house assessments must be used to determine whether the Priority List or an energy Audit is most appropriate for the unit. Whole house assessments must include but are not limited to the following items:

(1) Wall--Condition, type, orientation and existing R-values;

(2) Windows--Condition, type material, glazing type, leakiness and solar screens;

(3) Doors--Condition, type;

(4) Attic--Type, condition, existing R-values and ventilation;

(5) Foundation--Condition, existing R-values and floor height above ground level;

(6) Heating System--For all systems: unit type, fuel source (primary or secondary), thermostat, and output; for combustion systems only: vented or unvented efficiency, CO-levels, complete fuel gas analysis, gas leaks, and combustion venting;

(7) Cooling System--Unit type, condition, area cooled, size in BTU rating, Seasonal Energy Efficiency Rating (SEER) or Energy Efficiency Rating (EER), manufacture date and thermostat;

(8) Duct System--Condition, existing insulation level, evaluation of registers, return air register size, and condition of plenum joints;

(9) Water Heater--For all water heaters: condition, fuel type, energy factor, recovery efficiency, input and output ratings, size, existing insulation levels, existing pipe insulation; for combustion water heaters only: carbon monoxide levels, draft test, complete fuel gas analysis;

(10) Refrigerator--Condition, manufacturer, manufacture date and make, model, and consumption reading (minutes and meter reading); client refusal must be documented;

(11) Lighting System--Quantity, watts, and estimated hours used per day;

(12) Water Savers--Number of showerheads, estimated gallons per minute and estimated minutes used per day;

(13) Health and Safety--For all units: smoke detectors, wiring, minimum air exchange, moisture problems, lead paint present, asbestos siding present, condition of chimney, plumbing problems, mold; for units with combustion appliances: unvented space heaters, carbon monoxide levels on all combustion appliances, carbon monoxide detectors;

(14) Air Infiltration--To be determined from Blower Door testing; areas requiring air sealing will be noted;

(15) Repairs--Measures needed to preserve or protect installed weatherization measures may include lumber, shingles, flashing, siding, masonry supplies, minor window repair, gutters, downspouts, paint, stains, sealants, and underpinning.

(b) If using the Energy Audit, all allowable weatherization measures needed must be entered. Measures will be performed in order of highest SIR to lowest depending on funds available. If using the Priority List, included weatherization measures must be addressed in the order they appear on the list, or an explanation for excluding a measure must be provided.

The Board approved the final order adopting the amendments on November 10, 2010.

The amendments are adopted pursuant to the authority of the Texas Government Code Chapter 2306, which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

§5.529. Whole House Assessment.

(a) Subrecipients must conduct a whole house assessment on all eligible units. Whole house assessments must be used to determine whether the Priority List or an energy Audit is most appropriate for the unit. Whole house assessments must include but are not limited to the following items:

(1) Wall--Condition, type, orientation and existing R-values;

(2) Windows--Condition, type material, glazing type, leakiness and solar screens;

(3) Doors--Condition, type;

(4) Attic--Type, condition, existing R-values and ventilation;

(5) Foundation--Condition, existing R-values and floor height above ground level;

(6) Heating System--For all systems: unit type, fuel source (primary or secondary), thermostat, and output; for combustion sys-

tems only: vented or unvented efficiency, CO-levels, complete fuel gas analysis, gas leaks, and combustion venting;

(7) Cooling System--Unit type, condition, area cooled, size in BTU rating, Seasonal Energy Efficiency Rating (SEER) or Energy Efficiency Rating (EER), manufacture date and thermostat;

(8) Duct System--Condition, existing insulation level, evaluation of registers, return air register size, and condition of plenum joints;

(9) Water Heater--For all water heaters: condition, fuel type, energy factor, recovery efficiency, input and output ratings, size, existing insulation levels, existing pipe insulation; for combustion water heaters only: carbon monoxide levels, draft test, complete fuel gas analysis;

(10) Refrigerator--Condition, manufacturer, manufacture date and make, model, and consumption reading (minutes and meter reading); client refusal must be documented;

(11) Lighting System--Quantity, watts, and estimated hours used per day;

(12) Water Savers--Number of showerheads, estimated gallons per minute and estimated minutes used per day;

(13) Health and Safety--For all units: smoke detectors, wiring, minimum air exchange, moisture problems, lead paint present, asbestos siding present, condition of chimney, plumbing problems, mold; for units with combustion appliances: unvented space heaters, carbon monoxide levels on all combustion appliances, carbon monoxide detectors;

(14) Air Infiltration--To be determined from Blower Door testing; areas requiring air sealing will be noted;

(15) Repairs--Measures needed to preserve or protect installed weatherization measures may include lumber, shingles, flashing, siding, masonry supplies, minor window repair, gutters, downspouts, paint, stains, sealants, and underpinning.

(b) If using the Energy Audit, all allowable weatherization measures needed must be entered. Measures will be performed in order of highest SIR to lowest depending on funds available. If using the Priority List, included weatherization measures must be addressed in the order they appear on the list, or an explanation for excluding a measure must be provided.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER I. WEATHERIZATION ASSISTANCE PROGRAM DEPARTMENT OF ENERGY AMERICAN RECOVERY AND REINVESTMENT ACT (WAP ARRA)

10 TAC §§5.900, 5.901, 5.903

The Texas Department of Housing and Community Affairs (the "Department") adopts amendments to 10 TAC Chapter 5, Subchapter I, §§5.900, 5.901 and 5.903, regarding regulations related to Community Affairs Programs. Sections 5.901 and 5.903 are adopted with changes to the text as published in the August 13, 2010, issue of the *Texas Register* (35 TexReg 6879). Section 5.900 is adopted without changes and will not be republished.

For the Weatherization Assistance Program, the changes clarify the definitions of "Awarded Funds," "Production Schedule," and "Unit Production," adds a definition of "Plan;" clarify the contents of the Mitigation Action Plan; and add criteria outlining when a Notification of Possible Deobligation is not required to be sent to a Subrecipient.

The Department received comments to the proposed amendments in writing by email. This document provides the Department's response to all comments received. The comments and responses include both administrative clarifications and corrections to the amendments recommended by staff and substantive comments on the amendments and the corresponding Departmental responses. Comments and responses are presented in the order they appear in the rules.

REASONED RESPONSE TO PUBLIC COMMENT. Public comments were accepted through September 13, 2010, with comments received from (1) Mr. W. Laurence Doxsey, Director of the Office on Environmental Policy for the City of San Antonio. Staff reviewed the comments and provided reasoned responses.

§5.901(k).Definitions, Unit Production. (1)

COMMENT SUMMARY: Commenter requested that the definition include language that clarifies which invoices will be entered in to the system and considered when determining unit production goals.

STAFF RESPONSE: Staff agreed with commenter and amended the definition language as follows:

(k) Unit Production--A unit is considered "produced" for purposes of this rule when the unit is considered a final unit and the post-weatherization inspection and all other requirements have been satisfied. Subrecipients are required to maintain a financial system that provides reconciliation between the general ledger and the monthly report submitted to the Department as part of the required financial system, subrecipients are required to maintain documentation to support that they have made timely payment of invoices or related liabilities within forty-five (45) days from the end of the corresponding report period; a unit is not considered produced until all invoices directly associated with weatherization measures in the unit are entered into that system.

§5.903(m)(1) - (3). Notification and Action Plan. (1)

COMMENT SUMMARY: Commenter requested that TDHCA provide clarification on which facet of the Production Schedule will be considered cumulative benchmark under this new provision, and provide clarification in the rule language on whether the Subrecipient's monthly forecasts or the TDHCA benchmarks (e.g. 40% expenditures and production by October 2010) will be considered as the "Production Schedule," and recommended the following language to clarify the rule:

STAFF RESPONSE: Staff agreed with commenter and made the requested clarification in subsection (m)(1) - (3). To avoid the use of the terms "house dollars" and "non-house dollars," which are not defined in the rule, staff amended reference to "expenditures with no differentiation" as follows:

(m) Notification of deobligation will not be required to be sent to a Subrecipient or New Provider, and a Mitigation Action Plan will not be required to be provided to the Department, if any one or more of the following are satisfied:

(1) The total cumulative unit production for the Subrecipient or New Provider, based on the monthly report as reported in the Community Affairs contract system, is at least 85% of the total cumulative number of units to be completed as of the end of the month according to the Subrecipient's forecast unit production within the Production Schedule for the time period applicable (i.e. cumulative through the month for which reporting has been made).

(2) The total cumulative expenditures for the Subrecipient or New Provider, based on the monthly report as reported in the Community Affairs contract system, is at least 85% of the total cumulative estimated expenditures to be expended as of the end of the month according to the Subrecipient's forecast expenditures within the Production Schedule for the time period applicable (i.e. cumulative through the month for which reporting has been made).

(3) The Subrecipient's, or New Provider's, monthly reports as reported in the Community Affairs contract system, for the prior two months, as required under the contract between the Department and the Subrecipient, reflects unit production that is 90% or more of the unit production amount to be completed as of the end of the month according to the Subrecipient's forecast unit production within the Production Schedule.

The Board approved the final order adopting the amended sections on November 10, 2010.

The amendments are adopted pursuant to the authority of the Texas Government Code Chapter 2306, which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

§5.901. Definitions.

(a) Awarded Funds--The amount of WAP ARRA funds awarded by the Department in accordance with the Weatherization Assistance Program under the American Recovery and Reinvestment Act (WAP ARRA) Plan (the "Plan") to Subrecipients or New Providers of WAP ARRA funds. The amount of funds awarded reflects the full multi-year amount of WAP ARRA funds awarded to the Subrecipient or New Provider and not only the amount reflected in a contract.

(b) Deobligation--The partial or full removal of Awarded Funds from a Subrecipient or New Provider. Partial Deobligation is the removal of some portion of the full Awarded Funds from a Subrecipient or New Provider, leaving some remaining balance of Awarded Funds to be administered by the Subrecipient or New Provider. Full Deobligation is the removal of the full amount of Awarded Funds from a Subrecipient or New Provider.

(c) Department--The Texas Department of Housing and Community Affairs.

(d) Executive Director--The Executive Director of the Texas Department of Housing and Community Affairs.

(e) Expenditure--Funds having been drawn from the Department through the Contract System. For purposes of this rule, expenditure will include draws requested through the system.

(f) New Provider--An entity to which the Department has contractually obligated WAP ARRA funds subsequent to March 12, 2010.

(g) Plan--The Department's required plan for the administration of WAP ARRA submitted to and approved by the U.S. Department of Energy, together with all approved amendments thereto from time to time in effect.

(h) Production Schedule--A Production schedule signed by the applicable Executive Director/Chief Executive Officer of the Subrecipient or New Provider, approved by the Department, and meeting the requirements of this definition. The Production Schedule shall include a total estimated number of units to be completed with all Awarded Funds, based on the average per unit cost for the Subrecipient or New Provider; the estimated monthly and quarterly unit production; and the estimated monthly and quarterly expenditure targets for all Awarded Funds reflecting achievement of the criteria identified in §5.902 of this chapter (relating to Criteria for Deobligation of Fund Award). The Production Schedule should reflect delays that should reasonably be anticipated, and unit production estimates may vary significantly from month to month. The Production Schedule shall reflect by month estimated numbers for the total units to be produced. The Production Schedule is a requirement applicable to all WAP ARRA contracts administered by the Subrecipient or New Provider. The Production Schedule must demonstrate how all Awarded Funds will be expended by required ARRA deadlines. The Production Schedule as defined herein may differ significantly from the WAP ARRA plan production schedule submitted by the Department to the U.S. Department of Energy. In the case of any such conflict, the applicable Subrecipient or New Provider is required to comply with the Production Schedule.

(i) Reobligation--The reallocation of deobligated WAP ARRA funds to current Subrecipients and/or New Providers.

(j) Subrecipient--An entity to which the Department contractually obligated WAP ARRA funds prior to March 12, 2010. Subrecipients may have one or more contracts for WAP ARRA funds and reference to Subrecipient herein may include only one, some, or all of those contracts.

(k) Unit Production--A unit is considered "produced" for purposes of this rule when the unit is considered a final unit and the post-weatherization inspection and all other requirements have been satisfied. Subrecipients are required to maintain a financial system that provides reconciliation between the general ledger and the monthly report submitted to the Department as part of the required financial system, subrecipients are required to maintain documentation to support that they have made timely payment of invoices or related liabilities within forty-five (45) days from the end of the corresponding report period; a unit is not considered produced until all invoices directly associated with weatherization measures in the unit are entered into that system.

(l) WAP ARRA--The allocation of funds provided to the Department from the American Recovery Reinvestment Act of 2009 for the Department of Energy Weatherization Assistance Program.

§5.903. Notification and Action Plan.

(a) At any time that a Subrecipient or New Provider believes they may be at risk of meeting one of the criteria noted in §5.902 of this chapter (relating to Criteria for Deobligation of Fund Award), or of not achieving their Production Schedule goals, notification must be provided to the Department unless excepted under subsection (m) of this section.

(b) A written "Notification of Possible Deobligation" will be sent to the Executive Director of the Subrecipient or New Provider as soon as a criterion included in §5.902 of this chapter is at risk of being met. Written notice will be sent electronically and by mail. The notice will include an explanation of the criteria met.

(c) Within fifteen (15) days of the date of the "Notification of Possible Deobligation" referenced in subsection (b) of this section, a Mitigation Action Plan must be submitted to the Department by the Subrecipient or New Provider in the format prescribed by the Department unless excepted under subsection (m) of this section.

(d) A Mitigation Action Plan is not limited to but must include:

(1) Explanation of why one or more of the criteria under §5.902 of this chapter occurred setting out all fully relevant facts.

(2) Explanation of how the criteria under §5.902 of this chapter will be immediately, permanently, and adequately mitigated. For example, if production or expenditures are insufficient, the explanation would need to address how production or expenditures will be increased in the short- and long-term to restore projected full and timely execution of the contract with respect to all Awarded Funds.

(3) If applicable because of failure to produce Unit Production or Expenditure targets under the existing Production Schedule, a detailed narrative of how the production schedule will be revised, going forward, to assure achievement of sufficient, achievable Unit Production and Expenditures to ensure timely and compliant full utilization of all Awarded Funds.

(4) An explanation of how remaining criteria under §5.902 of this chapter will be avoided. For example, if Unit Production criteria for June 30, reflected under §5.902(b) of this chapter were not met, then explanation will need to include how the ensuing criteria will be met and the criteria under §5.902(c) of this chapter, avoided.

(5) If relating to a Unit Production or expenditure criteria, a description of activities currently being undertaken including an accurate description of the number of units in progress, broken down by number of units that have been qualified, audited, assessed, contracted, inspected, and invoiced and as reflected in an updated Production Schedule.

(6) Provide any request for a reduction in Awarded Funds, reasons for the request, desired Awarded Fund and revised Production Schedule reflecting the reduced Awarded Fund.

(e) At any time after sending a Notification of Deobligation, the Department or a third-party assigned by the Department may monitor, conduct onsite-visits or other assessment or engage in any other oversight of the Subrecipient or New Provider that is believed appropriate by the Department under the facts and circumstances.

(f) The Department or a third-party assigned by the Department will review the Mitigation Action Plan, and where applicable, assess the Subrecipient's or New Provider's ability to meet the revised Production Schedule or remedy other concern.

(g) After the Department's receipt of the Mitigation Action Plan, the Department will provide the Subrecipient or New Provider a written Corrective Action Notice indicating the Department's determination, which may include one or more of the criteria identified in §5.904 of this chapter (relating to Deobligation and Other Mitigating Actions) or other acceptable solutions or remedies.

(h) The Subrecipient or New Provider has seven (7) calendar days from the date of the Corrective Action Notice to appeal the Corrective Action Notice to the Executive Director. Appeals may include:

(1) Request for the full Fund Award;

(2) Request for only partial Deobligation of the full Awarded Fund if full Deobligation was indicated in the Corrective Action Notice;

(3) Request for other lawful action consistent with the timely and full completion of the contract and Production Schedule for all Awarded Funds.

(i) In the event that an appeal is submitted to the Executive Director, the Executive Director may grant extensions or forbearance of targets included in the Production Schedule, continued operation of a contract, authorize Deobligation, or take other lawful action that is designed to ensure the timely and full completion of the contract for all Awarded Funds.

(j) In the event the Executive Director denies an appeal, the Subrecipient will have the opportunity to have their appeal presented at the next Department Board meeting for which the matter may be posted in accordance with law and submitted for final determination by the Board.

(k) In the event an appeal is not submitted within seven (7) calendar days from the date of the Corrective Action Notice, the Corrective Action Notice will automatically become final without need of any further action or notice by the Department, and the Department will amend/terminate the contract with the Subrecipient or New Provider to effectuate the Corrective Action Notice.

(l) Prior to full deobligation of a Contract or Fund Award, a public hearing will be held. To the extent an appeal is filed and heard by the Board under subsection (j) of this section, this public hearing requirement will be satisfied by the publicly posted Board meeting for which the appeal appears on the agenda.

(m) Notification of deobligation will not be required to be sent to a Subrecipient or New Provider, and a Mitigation Action Plan will not be required to be provided to the Department, if any one or more of the following are satisfied:

(1) The total cumulative unit production for the Subrecipient or New Provider, based on the monthly report as reported in the Community Affairs contract system, is at least 85% of the total cumulative number of units to be completed as of the end of the month according to the Subrecipient's forecast unit production within the Production Schedule for the time period applicable (i.e. cumulative through the month for which reporting has been made).

(2) The total cumulative expenditures for the Subrecipient or New Provider, based on the monthly report as reported in the Community Affairs contract system, is at least 85% of the total cumulative estimated expenditures to be expended as of the end of the month according to the Subrecipient's forecast expenditures within the Production Schedule for the time period applicable (i.e. cumulative through the month for which reporting has been made).

(3) The Subrecipient's, or New Provider's, monthly reports as reported in the Community Affairs contract system, for the prior two months, as required under the contract between the Department and the Subrecipient, reflects unit production that is 90% or more of the unit production amount to be completed as of the end of the month according to the Subrecipient's forecast unit production within the Production Schedule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 18, 2010.

TRD-201006602
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
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Proposal publication date: August 13, 2010
For further information, please call: (512) 475-3916

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TITLE 22. EXAMINING BOARDS

PART 15. TEXAS STATE BOARD OF PHARMACY

CHAPTER 281. ADMINISTRATIVE PRACTICE AND PROCEDURES

SUBCHAPTER A. GENERAL PROVISIONS

22 TAC §281.6

The Texas State Board of Pharmacy adopts amendments to §281.6, concerning Mental or Physical Examination. The amendments are adopted without changes to the proposed text as published in the October 1, 2010, issue of the *Texas Register* (35 TexReg 8852).

The amendments clarify the requirements for mental or physical examinations and add registrants as individuals subject to the rule.

No comments were received.

The amendments are adopted under §§551.002, 554.051, 565.001(a)(4), 565.052, 568.003(a)(5), and 568.0036 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §565.001(a)(4) and §568.003(a)(5) as authorizing the agency to discipline an applicant or registrant if the individual has developed an incapacity. The Board interprets §565.052 and §568.0036 as authorizing the agency to request a licensee or applicant to submit to a mental or physical examination.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 17, 2010.

TRD-201006576
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Effective date: December 7, 2010
Proposal publication date: October 1, 2010
For further information, please call: (512) 305-8028

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SUBCHAPTER B. GENERAL PROCEDURES IN A CONTESTED CASE

22 TAC §281.23, §281.31

The Texas State Board of Pharmacy adopts new §281.23, concerning Subpoenas, and amendments to §281.31, concerning Burden of Proof. The amendments are adopted without changes to the proposed text as published in the October 1, 2010, issue of the *Texas Register* (35 TexReg 8853).

New §281.23 outlines the guidelines for issuing and requesting subpoenas. The amendments to §281.31 clarify that the applicant, licensee, or registrant has the burden of proof with regard to mental or physical evaluations.

No comments were received.

The new rule and amendments are adopted under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by the new rule and amendments: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
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For further information, please call: (512) 305-8028

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SUBCHAPTER C. DISCIPLINARY GUIDELINES

22 TAC §§281.60, 281.63, 281.64

The Texas State Board of Pharmacy adopts amendments to §281.60, concerning General Guidance; §281.63, concerning Considerations for Criminal Offenses; and §281.64, concerning Sanctions for Criminal Offenses. The amendments are adopted without changes to the proposed text as published in the October 1, 2010, issue of the *Texas Register* (35 TexReg 8854).

The amendments clarify disciplinary guidelines for use in informal conferences and proceedings before the State Office of Administrative Hearings.

No comments were received.

The amendments are adopted under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as

authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
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For further information, please call: (512) 305-8028

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CHAPTER 291. PHARMACIES
SUBCHAPTER B. COMMUNITY PHARMACY (CLASS A)

22 TAC §291.32, §291.33

The Texas State Board of Pharmacy adopts amendments to §291.32, concerning Personnel, and §291.33, concerning Operational Standards. The amendments to §291.32 are adopted with changes to the proposed text published in the October 1, 2010, issue of the *Texas Register* (35 TexReg 8855) as noted below. The amendments to §291.33 are adopted without changes to the proposed text as published in the October 1, 2010, issue of the *Texas Register* (35 TexReg 8855).

Comments were received from the National Association of Chain Drug Stores (NACDS) regarding §291.32. NACDS expressed concern with the proposed amendments because the amendments would require every pharmacist in a Class E (Non-resident) pharmacy to sign a written contract or agreement in order to perform electronic data entry verifications. NACDS further commented that the proposed amendments are more restrictive than what is currently required of pharmacists conducting electronic verification of data entry in Class E pharmacies as outlined in §291.123 regarding Central Prescription Drug or Medication Order Processing. The Board agrees with the comments and revised the amendments in accordance with the comments.

The amendments to §291.32 clarify the requirements for pharmacists conducting electronic verification of prescriptions from a site other than the pharmacy and allow the pharmacist to not have a Texas pharmacist license if the pharmacist is employed by a Class E (Non-resident) pharmacy. The amendments to §291.33 remove references to dates no longer needed, correct a reference to supportive personnel to pharmacy technicians and pharmacy technician trainees, and delete the language regarding generic substitution since this rule is also found in Chapter 309.

The amendments are adopted under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.32. Personnel.

(a) Pharmacist-in-charge.

(1) General.

(A) Each Class A pharmacy shall have one pharmacist-in-charge who is employed on a full-time basis, who may be the pharmacist-in-charge for only one such pharmacy; provided, however, such pharmacist-in-charge may be the pharmacist-in-charge of:

(i) more than one Class A pharmacy, if the additional Class A pharmacies are not open to provide pharmacy services simultaneously; or

(ii) up to two Class A pharmacies open simultaneously if the pharmacist-in-charge works at least 10 hours per week in each pharmacy.

(B) The pharmacist-in-charge shall comply with the provisions of §291.17 of this title (relating to Inventory Requirements).

(2) Responsibilities. The pharmacist-in-charge shall have responsibility for the practice of pharmacy at the pharmacy for which he or she is the pharmacist-in-charge. The pharmacist-in-charge may advise the owner on administrative or operational concerns. The pharmacist-in-charge shall have responsibility for, at a minimum, the following:

(A) education and training of pharmacy technicians and pharmacy technician trainees;

(B) supervising a system to assure appropriate procurement of prescription drugs and devices and other products dispensed from the Class A pharmacy;

(C) disposal and distribution of drugs from the Class A pharmacy;

(D) storage of all materials, including drugs, chemicals, and biologicals;

(E) maintaining records of all transactions of the Class A pharmacy necessary to maintain accurate control over and accountability for all pharmaceutical materials required by applicable state and federal laws and sections;

(F) supervising a system to assure maintenance of effective controls against the theft or diversion of prescription drugs, and records for such drugs;

(G) adherence to policies and procedures regarding the maintenance of records in a data processing system such that the data processing system is in compliance with Class A (community) pharmacy requirements;

(H) legal operation of the pharmacy, including meeting all inspection and other requirements of all state and federal laws or sections governing the practice of pharmacy; and

(I) if the pharmacy uses an automated pharmacy dispensing system, shall be responsible for the following:

(i) consulting with the owner concerning and adherence to the policies and procedures for system operation, safety, secu-

rity, accuracy and access, patient confidentiality, prevention of unauthorized access, and malfunction;

(ii) inspecting medications in the automated pharmacy dispensing system, at least monthly, for expiration date, misbranding, physical integrity, security, and accountability;

(iii) assigning, discontinuing, or changing personnel access to the automated pharmacy dispensing system;

(iv) ensuring that pharmacy technicians, pharmacy technician trainees, and licensed healthcare professionals performing any services in connection with an automated pharmacy dispensing system have been properly trained on the use of the system and can demonstrate comprehensive knowledge of the written policies and procedures for operation of the system; and

(v) ensuring that the automated pharmacy dispensing system is stocked accurately and an accountability record is maintained in accordance with the written policies and procedures of operation.

(b) Owner. The owner of a Class A pharmacy shall have responsibility for all administrative and operational functions of the pharmacy. The pharmacist-in-charge may advise the owner on administrative and operational concerns. The owner shall have responsibility for, at a minimum, the following, and if the owner is not a Texas licensed pharmacist, the owner shall consult with the pharmacist-in-charge or another Texas licensed pharmacist:

(1) establishment of policies for procurement of prescription drugs and devices and other products dispensed from the Class A pharmacy;

(2) establishment of polices and procedures for the security of the prescription department including the maintenance of effective controls against the theft or diversion of prescription drugs;

(3) if the pharmacy uses an automated pharmacy dispensing system, reviewing and approving all policies and procedures for system operation, safety, security, accuracy and access, patient confidentiality, prevention of unauthorized access, and malfunction;

(4) providing the pharmacy with the necessary equipment and resources commensurate with its level and type of practice; and

(5) establishment of policies and procedures regarding maintenance, storage, and retrieval of records in a data processing system such that the system is in compliance with state and federal requirements.

(c) Pharmacists.

(1) General.

(A) The pharmacist-in-charge shall be assisted by sufficient number of additional licensed pharmacists as may be required to operate the Class A pharmacy competently, safely, and adequately to meet the needs of the patients of the pharmacy.

(B) All pharmacists shall assist the pharmacist-in-charge in meeting his or her responsibilities in ordering, dispensing, and accounting for prescription drugs.

(C) Pharmacists are solely responsible for the direct supervision of pharmacy technicians and pharmacy technician trainees and for designating and delegating duties, other than those listed in paragraph (2) of this subsection, to pharmacy technicians and pharmacy technician trainees. Each pharmacist shall be responsible for any delegated act performed by pharmacy technicians and pharmacy technician trainees under his or her supervision.

(D) Pharmacists shall directly supervise pharmacy technicians and pharmacy technician trainees who are entering prescription data into the pharmacy's data processing system by one of the following methods.

(i) Physically present supervision. A pharmacist shall be physically present to directly supervise a pharmacy technician or pharmacy technician trainee who is entering prescription data into the data processing system. Each prescription entered into the data processing system shall be verified at the time of data entry. If the pharmacist is not physically present due to a temporary absence as specified in §291.33(b)(3) of this title (relating to Operational Standards), on return the pharmacist must:

(I) conduct a drug regimen review for the prescriptions data entered during this time period as specified in §291.33(c)(2) of this title; and

(II) verify that prescription data entered during this time period was entered accurately.

(ii) Electronic supervision. A pharmacist may electronically supervise a pharmacy technician or pharmacy technician trainee who is entering prescription data into the data processing system provided the pharmacist:

(I) is on-site, in the pharmacy where the technician/trainee is located;

(II) has immediate access to any original document containing prescription information or other information related to the dispensing of the prescription. Such access may be through imaging technology provided the pharmacist has the ability to review the original, hardcopy documents if needed for clarification; and

(III) verifies the accuracy of the data entered information prior to the release of the information to the system for storage and/or generation of the prescription label.

(iii) Electronic verification of data entry by pharmacy technicians or pharmacy technician trainees. A pharmacist may electronically verify the data entry of prescription information into a data processing system provided:

(I) a pharmacist is on-site in the pharmacy where the pharmacy technicians/trainees are located;

(II) the pharmacist electronically conducting the verification is either a:

(-a-) Texas licensed pharmacist; or

(-b-) pharmacist employed by a Class E pharmacy that:

(-1-) has the same owner as the Class A pharmacy where the pharmacy technicians/trainees are located; or

(-2-) has entered into a written contract or agreement with the Class A pharmacy, which outlines the services to be provided and the responsibilities and accountabilities of each pharmacy in compliance with federal and state laws and regulations;

(III) the pharmacy establishes controls to protect the privacy and security of confidential records; and

(IV) the pharmacy keeps permanent records of prescriptions electronically verified for a period of two years.

(E) All pharmacists while on duty, shall be responsible for complying with all state and federal laws or rules governing the practice of pharmacy.

(F) A dispensing pharmacist shall be responsible for and ensure that the drug is dispensed and delivered safely, and accurately as prescribed, unless the pharmacy's data processing system can record the identity of each pharmacist involved in a specific portion of the dispensing processing. If the system can track the identity of each pharmacist involved in the dispensing process, each pharmacist involved in the dispensing process shall be responsible for and ensure that the portion of the process the pharmacist is performing results in the safe and accurate dispensing and delivery of the drug as prescribed. The dispensing process shall include, but not be limited to, drug regimen review and verification of accurate prescription data entry, including data entry of prescriptions placed on hold, packaging, preparation, compounding and labeling, and performance of the final check of the dispensed prescription.

(2) Duties. Duties which may only be performed by a pharmacist are as follows:

(A) receiving oral prescription drug orders and reducing these orders to writing, either manually or electronically;

(B) interpreting prescription drug orders;

(C) selection of drug products;

(D) performing the final check of the dispensed prescription before delivery to the patient to ensure that the prescription has been dispensed accurately as prescribed;

(E) communicating to the patient or patient's agent information about the prescription drug or device which in the exercise of the pharmacist's professional judgement, the pharmacist deems significant, as specified in §291.33(c) of this title;

(F) communicating to the patient or the patient's agent on his or her request information concerning any prescription drugs dispensed to the patient by the pharmacy;

(G) assuring that a reasonable effort is made to obtain, record, and maintain patient medication records;

(H) interpreting patient medication records and performing drug regimen reviews; and

(I) performing a specific act of drug therapy management for a patient delegated to a pharmacist by a written protocol from a physician licensed in this state in compliance with the Medical Practice Act.

(3) Special requirements for compounding.

(A) Non-Sterile Preparations. All pharmacists engaged in compounding non-sterile preparations shall meet the training requirements specified in §291.131 of this title (relating to Pharmacies Compounding Non-Sterile Preparations).

(B) Sterile Preparations. All pharmacists engaged in compounding sterile preparations shall meet the training requirements specified in §291.133 of this title (relating to Pharmacies Compounding Sterile Preparations).

(d) Pharmacy Technicians and Pharmacy Technician Trainees.

(1) General.

(A) All pharmacy technicians and pharmacy technician trainees shall meet the training requirements specified in §297.6 of this title (relating to Pharmacy Technician and Pharmacy Technician Trainee Training).

(B) Special requirements for compounding.

(i) Non-Sterile Preparations. All pharmacy technicians and pharmacy technician trainees engaged in compounding non-sterile preparations shall meet the training requirements specified in §291.131 of this title.

(ii) Sterile Preparations. All pharmacy technicians and pharmacy technician trainees engaged in compounding sterile preparations shall meet the training requirements specified in §291.133 of this title.

(2) Duties.

(A) Pharmacy technicians and pharmacy technician trainees may not perform any of the duties listed in subsection (c)(2) of this section.

(B) A pharmacist may delegate to pharmacy technicians and pharmacy technician trainees any nonjudgmental technical duty associated with the preparation and distribution of prescription drugs provided:

(i) a pharmacist verifies the accuracy of all acts, tasks, and functions performed by pharmacy technicians and pharmacy technician trainees;

(ii) pharmacy technicians and pharmacy technician trainees are under the direct supervision of and responsible to a pharmacist; and

(iii) only pharmacy technicians and pharmacy technician trainees who have been properly trained on the use of an automated pharmacy dispensing system and can demonstrate comprehensive knowledge of the written policies and procedures for the operation of the system may be allowed access to the system; and

(C) Pharmacy technicians and pharmacy technician trainees may perform only nonjudgmental technical duties associated with the preparation and distribution of prescription drugs, as follows:

(i) initiating and receiving refill authorization requests;

(ii) entering prescription data into a data processing system;

(iii) taking a stock bottle from the shelf for a prescription;

(iv) preparing and packaging prescription drug orders (i.e., counting tablets/capsules, measuring liquids and placing them in the prescription container);

(v) affixing prescription labels and auxiliary labels to the prescription container;

(vi) reconstituting medications;

(vii) prepackaging and labeling prepackaged drugs;

(viii) loading bulk unlabeled drugs into an automated dispensing system provided a pharmacist verifies that the system is properly loaded prior to use;

(ix) compounding non-sterile and sterile prescription drug orders; and

(x) bulk compounding.

(3) Ratio of on-site pharmacist to pharmacy technicians and pharmacy technician trainees.

(A) Except as provided in subparagraph (B) of this paragraph, the ratio of on-site pharmacists to pharmacy technicians and pharmacy technician trainees may be 1:3, provided the pharmacist

is on-site and at least one of the three is a pharmacy technician. The ratio of pharmacists to pharmacy technician trainees may not exceed 1:2.

(B) As specified in §568.006 of the Act, a Class A pharmacy may have a ratio of on-site pharmacists to pharmacy technicians/pharmacy technician trainees of 1:5 provided:

(i) the Class A pharmacy:

(I) dispenses no more than 20 different prescription drugs; and

(II) does not produce sterile preparations including intravenous or intramuscular drugs on-site; and

(ii) the following conditions are met:

(I) at least four are pharmacy technicians and not pharmacy technician trainees; and

(II) The pharmacy has written policies and procedures regarding the supervision of pharmacy technicians and pharmacy technician trainees, including requirements that the pharmacy technicians and pharmacy technician trainees included in a 1:5 ratio may be involved only in one process at a time. For example, a technician/trainee who is compounding non-sterile preparations or who is involved in the preparation of prescription drug orders may not also call physicians for authorization of refills.

(e) Identification of pharmacy personnel. All pharmacy personnel shall be identified as follows.

(1) Pharmacy technicians. All pharmacy technicians shall wear an identification tag or badge that bears the person's name and identifies him or her as a pharmacy technician, or a certified pharmacy technician, if the technician maintains current certification with the Pharmacy Technician Certification Board or any other entity providing an examination approved by the board.

(2) Pharmacy technician trainees. All pharmacy technician trainees shall wear an identification tag or badge that bears the person's name and identifies him or her as a pharmacy technician trainee.

(3) Pharmacist interns. All pharmacist interns shall wear an identification tag or badge that bears the person's name and identifies him or her as a pharmacist intern.

(4) Pharmacists. All pharmacists shall wear an identification tag or badge that bears the person's name and identifies him or her as a pharmacist.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-201006583
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
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For further information, please call: (512) 305-8028

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SUBCHAPTER D. INSTITUTIONAL PHARMACY (CLASS C)

22 TAC §291.72, §291.73

The Texas State Board of Pharmacy adopts amendments to §291.72, concerning Definitions, and §291.73, concerning Personnel. The amendments are adopted without changes to the proposed text as published in the October 1, 2010, issue of the *Texas Register* (35 TexReg 8860).

The amendments to §291.72 and §291.73 clarify the requirements for pharmacies with a clinical pharmacy program utilizing tech-check-tech and require a pharmacist to be on-site at the pharmacy when the pharmacy is open for pharmacies utilizing tech-check-tech.

No comments were received.

The amendments are adopted under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
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For further information, please call: (512) 305-8028

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CHAPTER 309. SUBSTITUTION OF DRUG PRODUCTS

The Texas State Board of Pharmacy adopts amendments to §309.3, concerning Generic Substitution, §309.4, concerning Patient Notification, and the repeal of §309.5, concerning Labeling Requirements. The amendments and repeal are adopted without changes to the proposed text as published in the October 1, 2010, issue of the *Texas Register* (35 TexReg 8860).

The amendments to §309.3 and §309.4 clarify the requirements for generic substitution on electronic prescription drug orders, remove the language regarding substitution of dosage form since it is duplicative of language in §291.33 and eliminate date references since the dates are no longer needed. The adopted repeal of §309.5 removes the labeling requirements from this chapter because the language is found in §291.33.

No comments were received.

22 TAC §309.3, §309.4

The amendments are adopted under §§551.002, 554.051, and 562.015 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §562.015 gives the Board the authority to adopt rules to provide a dispensing directive to instruct pharmacists on the manner in which to dispense a drug according to the contents of a prescription.

The statutes affected by the amendments: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-201006580
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
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For further information, please call: (512) 305-8028

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22 TAC §309.5

The repeal is adopted under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code) and Chapter 53 of the Texas Occupations Code. The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets Chapter 53 as authorizing the agency to issue a criminal history evaluation letter and to charge a fee sufficient to cover the costs associated with the criminal history evaluation.

The statutes affected by this repeal: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code and Chapter 53, Texas Occupations Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
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For further information, please call: (512) 305-8028

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PART 22. TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY

CHAPTER 501. RULES OF PROFESSIONAL CONDUCT

SUBCHAPTER E. RESPONSIBILITIES TO THE BOARD/PROFESSION

22 TAC §501.91

The Texas State Board of Public Accountancy adopts an amendment to §501.91, concerning Reportable Events, without changes to the proposed text as published in the October 8, 2010, issue of the *Texas Register* (35 TexReg 9035) and will not be republished.

The amendment will require the reporting of settlement agreements not related to the practice of public accountancy.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Public Accountancy Act (Act), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-201006594
J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Effective date: December 8, 2010
Proposal publication date: October 8, 2010
For further information, please call: (512) 305-7842

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CHAPTER 519. PRACTICE AND PROCEDURE

SUBCHAPTER A. GENERAL PROVISIONS

22 TAC §519.7

The Texas State Board of Public Accountancy adopts an amendment to §519.7, concerning Misdemeanors that Subject a Certificate or Registration Holder to Discipline by the Board, without changes to the proposed text as published in the October 8, 2010, issue of the *Texas Register* (35 TexReg 9040) and will not be republished.

The amendment will add the misdemeanor conviction of "hindering apprehension or prosecution" to the list of misdemeanors that would subject a licensee to disciplinary action.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Public Accountancy Act (Act), Texas Occupations Code, §901.151 which provides the

agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 18, 2010.

TRD-201006595
J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
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For further information, please call: (512) 305-7842

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CHAPTER 523. CONTINUING PROFESSIONAL EDUCATION

SUBCHAPTER B. CONTINUING PROFESSIONAL EDUCATION RULES FOR INDIVIDUALS

22 TAC §523.121

The Texas State Board of Public Accountancy adopts an amendment to §523.121, concerning CPE for Non-CPA Owners, with changes to the proposed text that was published in the October 8, 2010, issue of the *Texas Register* (35 TexReg 9044) and will be republished. Changes can be found in subsection (c).

The amendment will require the completion of the required CPE following the acquisition of ownership by a non-CPA within 60 days.

The Board received one comment on the proposed rule amendment. A representative of the Texas Society of CPAs ("TSCPA") commented that it is not always practical to complete CPE prior to actually obtaining ownership in a CPA firm. The commenter suggested a grace period. The Board agrees with the recommendation and has amended the rule to allow a 60-day grace period to complete the required CPE following the acquisition of ownership by a non-CPA.

The amendment is adopted under the Public Accountancy Act (Act), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by the adoption.

§523.121. CPE for Non-CPA Owners.

(a) Each non-CPA owner of a licensed CPA firm shall complete an average of 120 hours of CPE in each three-year period and have a minimum of 20 hours per year. These hours shall be reported on the required board forms. The failure of any non-CPA owner of a licensed CPA firm to complete and report such CPE shall be grounds for revoking the firm's license on the grounds that the owner is not qualified.

(b) The board will accept any CPE that is offered or accepted by organizations or regulatory bodies issuing any professional designation used by the non-CPA owner. All other CPE must be provided by board-accepted CPE sponsors or be otherwise approved by the board, provided however, that the board reserves the right to reject any claimed CPE.

(c) Each non-CPA, prior to, or within 60 days of, acquiring any ownership interest in a licensed CPA firm, shall complete a board-approved rules and ethics course in accordance with §523.130 of this title (relating to Ethics Course Requirements for Licensees).

(d) Each non-CPA owner must take a four hour ethics course that has been approved by the board pursuant to §523.131 of this title (relating to Board Approval of Ethics Course Content) every two years. Non-CPA owners shall report completion of the course on the annual firm renewal notice at least every second year.

(e) The board has the right to audit any CPE hours claimed. A firm shall provide the board all information required for this audit in accordance with §501.93 of this title (relating to Responses) and the firm shall be responsible for its non-CPA owner's cooperation with the audit.

(f) Subsections (a) through (e) of this section apply only to non-CPA owners who are residents of this state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 18, 2010.

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J. Randel (Jerry) Hill
General Counsel
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PART 39. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS

CHAPTER 851. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS LICENSING RULES

The Texas Board of Professional Geoscientists (Board or TBPG) adopts amendments to 22 TAC §851.10; repeals 22 TAC §§851.20, 851.21, 851.23 - 851.25, 851.27 - 851.32, 851.40 - 851.46, 851.80, 851.101 - 851.110, 851.151 - 851.158, and 851.201 - 851.243; and new 22 TAC §§851.20, 851.21, 851.23 - 851.25, 851.27 - 851.32, 851.40 - 851.46, 851.80, 851.101 - 851.114, 851.151 - 851.153, 851.156 - 851.158, and 851.201 - 851.243, concerning the licensure and regulation of Professional Geoscientists. The repeal of §§851.20, 851.21, 851.23 - 851.25, 851.27 - 851.32, 851.40 - 851.46, 851.80, 851.101 - 851.110, 851.151 - 851.158, and 851.201 - 851.243; and new §§851.20, 851.21, 851.23 - 851.25, 851.27 - 851.29, 851.31, 851.32, 851.40 - 851.46, 851.80, 851.102 - 851.105, 851.107 - 851.110, 851.113, 851.114, 851.153, 851.156, 851.158, and 851.201 - 851.243 are adopted without changes to the proposed text as published in the July 16, 2010, issue of the *Texas Register* (35 TexReg 6185) and will not be republished. The

amendments to §851.10; and new §§851.30, 851.101, 851.106, 851.111, 851.112, 851.151, 851.152, and 851.157 are adopted with changes to the proposed text as published in the July 16, 2010, issue of the *Texas Register* (35 TexReg 6185) and will be republished. The adoptions become effective December 15, 2010.

BACKGROUND AND PURPOSE

These amendments, repeals and new rules will reorganize, specify and clarify the requirements for examination and licensure, firm registration and certification as a Geoscientist-in-Training; clarify the application procedures; clarify the distinction between the license and the license certificate; clarify license, registration, and certification renewal requirements and procedures; define the role of the Authorized Official of a Firm; strengthen the professional code of conduct and apply relevant portions of it to registered firms, the Authorized Official of a Firm, and Geoscientists-in-Training; clarify complaint procedures and the actions the Board may impose on a Professional Geoscientist, a registered firm, an Authorized Official of a Firm, a Geoscientist-in-Training, an unlicensed individual and an unregistered firm; correct minor errors; improve the definitions and rules; and ensure that the rules reflect current legal, policy, and operational considerations. These revisions are a result of the review of the entire chapter in accordance with the Texas Government Code §2001.039.

SECTION-BY-SECTION SUMMARY

An amendment to Subchapter A is adopted to change the title to "Definitions" and separate §851.10, relating to definitions, to make it clear that the definitions in §851.10 apply to the entire chapter. Amendments to §851.10 improve the definitions of Act, advertising or advertisement, applicant, application, complainant, discipline, filed date, geology, geophysics, geoscience, license, licensee and professional geoscience service; add definitions for accredited institutions or programs, address of record, Authorized Official of a Firm, certificant, complaint, default, geoscience firm, license certificate, license status, current license, expired license, permanently expired license, Professional Geoscientist, Practice for the public, The Public, registered firm, registrant, respondent, and sole-proprietorship; and delete the definition of firm. The definitions are renumbered accordingly. Additionally, the definition in (8) has been adopted with changes to capitalize the phrase "Authorized Official of a Firm" and to include the acronym "AOF" in parentheses after the term is used.

TBPG repeals §§851.20, 851.21, 851.23 - 851.25, 851.27 - 851.32, 851.40 - 851.46, and 851.80 from Subchapter A and replaces them as new under Subchapter B. This will allow these sections to be re-located under the new Subchapter B entitled "P.G. Licensing, Firm Registration, and GIT Certification;" repeals §§851.101 - 851.110 and replaces them with new §§851.101 - 851.114 under Subchapter C which is now entitled "Code of Professional Conduct;" repeals §§851.151 - 851.158 and replaces them with new §§851.151 - 851.153 and §§851.156 - 851.158, under Subchapter D, now entitled "Compliance and Enforcement;" and repeals §§851.201 - 851.243 and replaces them with new §§851.201 - 851.243 under Subchapter E, entitled "Hearings--Contested Cases."

Adopted new §851.20 specifies the requirements for licensure as a Professional Geoscientist to be consistent with the Texas Occupations Code §1002.255 and §1002.256, specifically the requirements related to examination, qualifying work experience, moral character, academic requirements, and provision of supporting documentation of any licensure requirement as determined by TBPG staff related to criminal convictions, substance abuse issues and relating to issues surrounding reasons the Board may deny a license; specifies that the Board may accept qualifying work experience in lieu of the education requirement; specifies the requirements and examination request procedure for the National Association of State Boards of Geology (ASBOG) Fundamentals of Geology examination, the ASBOG Practice of Geology examination, and the Texas Geophysics Examination; specifies that the procedure for taking the Council of Soil Science Examiners' (CSSE) Fundamentals of Soil Science and Practice of Soil Science examinations is to apply directly with, submit examination fees to, and follow the procedures of the CSSE; specifies the Professional Geoscientist application procedure; specifies the procedures followed by the agency staff to issue a license once all required materials and fees required for licensure have been submitted to the agency; specifies the length of an initial Professional Geoscientist license; specifies that a license certificate, license expiration card, and wallet license expiration card shall be provided upon initial licensure as a Professional Geoscientist; specifies the procedure for an applicant to request licensure by waiver of a license requirement and specifies that the Board may waive any license requirement, except for a fee; specifies that an application is active for one year and that an application expires after one year; specifies that obtaining or attempting to obtain a license by fraud is grounds for an administrative sanction or penalty; specifies that an application is not reviewed until the application and fee have been received in the TBPG office and specifies that applicant is initially notified of any deficiencies in the application approximately thirty (30) days after receipt of the application and fee; specifies that an applicant should respond to a deficiency notice within forty-five (45) days from the date of notification for applicants to correct deficiencies and that if an applicant does not respond to a deficiency notice or does not ensure that necessary documents are provided to the TBPG office, the application will expire as scheduled one year after the date it became active; specifies that an original license is valid for a period of one year from the date it is issued, and that upon the first timely renewal of a license, the renewal period shall be from the date the license is renewed until the last day of the next birth month for the licensee; specifies that the fee for the first renewal period shall be prorated; specifies that the second timely renewal and every subsequent timely renewal period shall be the one year period following the expiration date of the license; specifies that a license that is renewed late (one day after the expiration date of the license through the end of the 36th month past the expiration date of the license) is renewed in accordance to the rules set forth in §851.28 of the Board's rules; removes previous subsections (a) - (d) of this section since the new rules address the application procedures and rules addressed in the removed sections; specifies that the Professional Geoscientist license is the legal authority granted the holder to actively practice geoscience upon meeting the requirements as set out in the Act and these rules; specifies that when a license is issued, a license certificate, the first license certificate expiration card, and the first wallet license card is provided to the new licensee; specifies that the license certificate shall bear the name of the licensee, the licensee's unique Professional Geoscientist license number, the discipline in which the person is licensed, and the date the license was originally issued; specifies that the license certificate is not valid proof of licensure unless the license certificate expiration card is accompanying the license certificate and the date on the license certificate card is not expired; specifies that the license certificate expiration card

shall bear the name of the licensee, the licensee's unique Professional Geoscientist license number, and the date the license will expire unless it is renewed; specifies that the wallet license card shall bear the name of the licensee, the licensee's unique Professional Geoscientist license number, the date the license was originally issued, the discipline in which the person is licensed, and the date the license will expire unless it is renewed; and renumbers the section accordingly.

Adopted new §851.21 removes language that previously allowed an applicant to take an examination in a language other than English if the applicant paid the translation costs; specifies that an applicant for the Geophysics discipline must pass the Texas Geophysics Examination; and renumbers the section accordingly.

Adopted new §851.23 improves language and clarifies that an applicant's experience record must demonstrate evidence of the applicant's competency to be placed in responsible charge of a geoscience work of similar character.

Adopted new §851.24 specifies that professional references provided by an applicant shall include not fewer than three that are from Professional Geoscientists or other professionals acceptable to the Board who have knowledge of the applicant's relevant work experience, unless more letters of reference are required to meet the requirements; and improves language.

Adopted new §851.25 specifies that an applicant must have graduated from an accredited university or program; adds petroleum geology as a sub discipline of geology; specifies that degrees and coursework earned at foreign universities shall be acceptable if the degree conferred and coursework has been determined by a member of the National Association of Credential Evaluation Services (NACES) to be equivalent to a degree conferred by or coursework completed in an accredited institution or program and that it is the applicant's responsibility to have degrees and coursework so evaluated; specifies that the commercial evaluation of a degree will not be accepted in lieu of an official transcript; specifies that the relevance to the licensing requirements of academic courses, the titles of which are not self-explanatory, must be substantiated through course descriptions in official school catalogs, bulletins, syllabi, or by other means; specifies that the Board shall accept no coursework which an applicant's transcript indicates was not completed with a passing grade or for credit; and specifies that in evaluating two or more sets of transcripts from a single applicant, the Board shall consider a quarter hour of academic credit as two-thirds of a semester hour.

Adopted new §851.27 changes the title of the section to "Replacement License Certificate or License Expiration Cards;" specifies that a new or duplicate license certificate, a new or duplicate license certificate expiration card, or a new wallet license expiration card to post in a secondary work location or to replace one lost, destroyed, or mutilated, may be issued, subject to the rules of the Board, on payment of the established fee; and specifies that a licensee need not destroy his or her current license certificate, but shall remain responsible for its care and custody, including any misuse of the certificate, removing the requirement to destroy a previous certificate and filing a signed statement setting out the reasons for the request so that the Board records will reflect the reason for issuance of a new license.

Adopted new §851.28 changes the title of the section to "Professional Geoscientist License Renewal and Reinstatement;" specifies that a licensee may renew a current license up to sixty (60) days in advance of its expiration online by accessing the online renewal link from the Board's website and that a licensee may also renew by paper application for renewal by accessing the form on the agency website or calling for a copy of the form up to ninety (90) days in advance of the expiration of the license through up to but not including three years after the expiration of the license; specifies that the first renewal period shall be set no more than twelve (12) months from the first renewal date and the expiration of the first renewal term shall be set to coincide with the last day of the licensee's birth month; specifies that the first year renewal fee shall be prorated for the number of months in the first renewal period; specifies that every subsequent expiration date shall be set for one year past the previous renewal date; specifies that a late fee of $50 will be charged for each renewal application received sixty-one (61) days after the licensee's expiration date, unless the renewal is received by mail or courier and is postmarked on or before sixty (60) days after the date of expiration; specifies the fee for a license that is renewed within the first sixty (60) days of expiration is the fee that was or is in place at the time the license expired; removes language that uses the term "lapsed" to describe a license that is expired for more than sixty (60) days; provides that a licensee who renews a license that has been expired for more than sixty (60) days must submit a signed affirmation indicating whether the licensee practiced as a P.G. when their license was expired; specifies that the fee for a license that is renewed within the first year of expiration is the fee that was or is in place at the time the license expired; specifies that a license that has expired for more than one year but less than three years after the original expiration date may be renewed by submitting to the Board an annual renewal application and fee, plus the annual renewal fee that was in place at each expiration/renewal that would have occurred if the license had been renewed on time each year since it expired, the late fee which would have applied after every scheduled license renewal was delinquent for sixty (60) days and proof of having met the continuing education requirements as required in §851.32(o) of the Board's rules and that the licensee must also submit a signed affirmation indicating whether the licensee practiced as a P.G. when the license was expired; specifies that if an applicant for renewal who has met the requirements for renewal has practiced as a P.G. with the license expired, unless certain allegations of misconduct are present, the license shall be renewed and that information regarding unlicensed practice received under this section shall be referred to the enforcement division for appropriate action that could include the initiation of a complaint by the Board; specifies that a license that is allowed to expire for a period of three years after the original expiration date is permanently expired and may not be renewed; specifies that a former license holder may re-apply for a new license as provided by the Act and applicable Board rules and will have to meet all licensure requirements in the Act and rules at the time of re-application; specifies that the application fee is non refundable; improves language and renumbers the section accordingly.

Adopted new §851.29 changes the title of the section to "Licensure by Endorsement, Licensure under a Reciprocal Agreement, and Reciprocal Licensure by Similar Examination;" removes current subsections (a) and (b) because a reciprocal license by similar examination is addressed in new subsection (c) of this section; adds a subsection that specifies that an applicant for a Professional Geoscientist license who is currently or has been licensed or registered to practice a discipline of geoscience under the law of another state, a territory or possession of the United States, or the District of Columbia may be eligible to demon-

strate having met all or some of the qualifications for licensure through endorsement; specifies that licensure by endorsement is the process whereby the Board issues a license based on review of evidence of an applicant's completion of all or part of the requirements for licensure in Texas based on documentation of having met the same or a similar requirement in another Professional Geoscientist licensing jurisdiction in the successful application for a license in that jurisdiction; specifies that the Board will only accept documentation provided to the Board directly from a licensing authority that has issued a license to the applicant; specifies that it is the responsibility of the applicant to ensure that the licensing authority provide information to the Board; specifies that any cost associated with the transmission of information to the Board is the responsibility of the applicant; specifies that in order for the Board to consider evidence, the applicant must ensure that his or her licensing authority provide verification of the license acceptable to the Board and verification of the specific qualifications that were met in order to become licensed; specifies that verification of the specific qualifications that were met in order to become licensed may be in the form of a letter signed by an authorized agent of the authority indicating the specific qualifications that were met in order to become licensed and/or copies of specific documents that were submitted to the licensing authority to document having met a specific requirement; specifies that the Board may accept, deny or grant partial credit for requirements completed in a different jurisdiction; specifies that licensure by reciprocity agreement is the process whereby an applicant for licensure as a Professional Geoscientist in Texas who is currently licensed as a Professional Geoscientist (or equivalent license) in another United States jurisdiction (state, commonwealth or territory) becomes licensed in Texas and the process whereby an applicant currently licensed as a Professional Geoscientist in Texas applying for licensure as a Professional Geoscientist (or equivalent license) in the other jurisdiction becomes licensed in the other jurisdiction under the terms of a formal reciprocity agreement between the two jurisdiction's Boards; specifies that an applicant who holds a current license in a jurisdiction with which the TBPG has a reciprocity agreement may apply for licensure under the terms of the specific reciprocity agreement between the two Boards; specifies that the Board shall maintain a list of each state or foreign country in which the requirements and qualifications for licensure or registration are comparable to those established in this state and with which a reciprocity agreement exists; specifies that a person who is licensed or registered to practice a discipline of geoscience under the law of another state, a territory or possession of the United States, the District of Columbia, or a foreign country may apply to the Executive Director for licensure without meeting the examination requirements and that a person applying for licensure under this subsection must submit proof of passage of an examination or examinations that are substantially similar to the applicable §851.21 of the Board's rules; and improves language.

Adopted new §851.30 specifies that unless an exemption applies, as outlined in Texas Occupations Code §1002.351(b), a firm or corporation may engage in the public practice of geoscience only if the firm is currently registered with the Board and the geoscientific work is performed by, or under the supervision of, a Professional Geoscientist who is in responsible charge of the work and who signs and seals all geoscientific reports, documents, and other records or the business of the firm or corporation includes the public practice of geoscience as determined by Board rule and a principal of the firm or an officer or director of the corporation is a Professional Geoscientist and has overall supervision and control of the geoscientific work performed; specifies that for the purpose of fees, Geoscience Firms are categorized as either an unincorporated sole-proprietorship (a single owned Professional Geoscientist's geoscience business that has no separate legal existence from its owner) registered by the Board to engage in the public practice of geoscience or any other type of firm, corporation, partnership (whether or not the partnership is an incorporated entity) or other business entity registered by the Board to engage in the public practice of geoscience; specifies that unless registered by the Board or exempt from registration, a individual, firm or cooperation may not represent to the public that the entity is a Professional Geoscientist or able to perform geoscience services or produce work for which a P.G.'s seal is required; specifies the registration requirements for a firm to become a registered as a Geoscience Firm with the Board, including affirmation and demonstration that the entity offers or performs work that includes the public practice of geoscience, identification of an Authorized Official of a Firm who shall be responsible for certain duties relative to the firms compliance with laws and rules and communicating with the Board, that they operate under a business model consistent with Texas Occupations Code §1002.351, provide certain information to the Board upon application and comply with other certain requirements; specifies the steps and rules governing the firm registration initial and renewal application processes; specifies rules regarding certificates and renewal cards issued by the Board; specifies that in order to renew an expired firm registration, the firm must affirm whether geoscience services were offered or provided while the firm's registration was expired; specifies that the Board may initiate a complaint against a firm that practiced geoscience while its registration was expired; improves language and reorders and renumbers the section accordingly.

Adopted new §851.31 and §851.32 improves language.

Adopted new §§851.40 - 851.46, and 851.80 is consistent with existing rule.

Adopted new §851.101 specifies that any person or entity who holds a Professional Geoscientist license and/or is the Authorized Official of a Geoscience Firm, is a Geoscience Firm, or who holds a certificate as a Geoscientist-in-Training is responsible for understanding and complying with the Act, rules adopted by the Board and any other law or rule pertaining to the professional practice of geoscience; specifies that any person under application for, currently holding, or eligible to renew a license, registration, or certification issued by the Board is bound by the provisions of the Act and rules adopted by the Board; specifies that a Professional Geoscientist, an Authorized Official of a Firm, or a person who holds a certificate as a Geoscientist-in-Training having knowledge of any alleged violation of the Act and/or Board rules shall cooperate with the Board in furnishing such information as may be required; specifies that a Professional Geoscientist, an Authorized Official of a Firm, or a person who holds a certificate as a Geoscientist-in-Training shall promptly answer all inquiries concerning matters under the jurisdiction of the Board, and shall fully comply with final decisions and orders of the Board; specifies that failure to comply with these matters shall constitute a separate offense of misconduct subject to the penalties provided under the Act; specifies that relevant rules of conduct apply to P.G.s, Geoscience Firms, and Geoscientists-in-Training; improves language and renumbers accordingly.

Adopted new §851.102 changes the title to "Competence/Negligence," specifies that relevant subsections are applicable to Geoscience Firms; and improves language.

Adopted new §851.103 specifies that relevant subsections are applicable to Geoscience Firms and improves language.

Adopted new §851.104 specifies that relevant subsections are applicable to Geoscience Firms and Geoscientists-in-Training; specifies that a P.G., Geoscience Firm and Geoscientist-in-Training shall not make any false, misleading, deceptive, fraudulent or exaggerated claims or statements about the services of an organization or agency, including, but not limited to, the effectiveness of geoscientific services, qualifications, or products and to improve language; to specify that if a Professional Geoscientist, a Geoscientist-in-Training, or Geoscience Firm learns that any false, misleading, deceptive, fraudulent or exaggerated claims or statement about the geoscientific services, qualifications or products have been made, the licensee shall take reasonable steps to correct the inappropriate claims. As appropriate, the Professional Geoscientist, a Geoscientist-in-Training, or Geoscience Firm may notify the Board in writing about these claims; specifies that Professional Geoscientists and Geoscience Firms shall issue statements in an objective and truthful manner; specifies that Professional Geoscientists, Geoscientists-in-Training, and Geoscience Firms should strive to make affected parties aware of the concerns regarding particular actions or projects, and of the consequences of geoscientific decisions or judgments that are overruled or disregarded; specifies that all advertisements or announcements of professional services which a Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm offers, including telephone directory listings, business cards, etc. shall clearly state the person's or firm's licensure, registration or certification designation; specifies that information used by a Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm in any advertisement or announcement shall not contain information which is false, inaccurate, misleading, incomplete, out of context, deceptive or not readily verifiable; specifies that advertising includes, but is not limited to, any announcement of services, letterhead, signage, business cards, commercial products, and billing statements; specifies that a Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm who retains or hires others to advertise or promote the licensee's practice remains responsible for the statements and representations made; specifies that a Professional Geoscientist shall use the identification "Professional Geoscientist" or the initials, "P.G." in the professional use of the license holder's name, whether P.G. is in an exempt or non-exempt professional geoscience setting and in connection with any sign, directory, contract, document, pamphlet, stationery, advertisement, signature, or other means of written professional identification; specifies that a Geoscientist-in-Training shall use the identification "Geoscientist-in-Training" or the initials, "GIT" in the professional use of the license holder's name and in connection with any sign, directory, contract, document, pamphlet, stationery, advertisement, signature, or other means of written professional identification; and improves language.

Adopted new §851.105 specifies that relevant subsections are applicable to Geoscience Firms and Geoscientists-in-Training and improves language.

Adopted new §851.106 changes the title to "Responsibility to the Regulation of the Geoscience Profession and Public Protection;" specifies that Professional Geoscientists, Geoscientists-in-Training, and Geoscience Firms shall be entrusted to protect the health, safety, and welfare of the public in the practice of their profession; specifies that relevant subsections are applicable to Geoscience Firms and Geoscientists-in-Training; specifies that a Professional Geoscientist or Geoscience Firm shall keep adequate records of geoscientific services provided to the public for no less than five (5) years following the completion and final delivery of the service; specifies what adequate records shall include, but not be limited to; specifies that Professional Geoscientists, Geoscientists-in-Training, and Geoscience Firms should strive to adequately examine the environmental impact of their actions and projects, including the prudent use and conservation of resources and energy, in order to make informed recommendations and decisions; and improves language.

Adopted new §851.107 specifies that relevant subsections are applicable to Geoscience Firms and Geoscientists-in-Training; specifies that a Geoscience Firm that fails to renew its Geoscience Firm registration prior to its annual expiration date shall not use the title "Geoscience Firm" and shall not engage or offer to engage in the public practice of geoscience as defined by the Texas Occupations Code §1002.002 until after the Geoscience Firm's registration has been properly renewed; specifies that a Geoscientist-in-Training who fails to renew his/her certification prior to its annual expiration date shall not use the title "Geoscientist-in-Training" until after the Geoscientist-in-Training certification has been properly renewed; and improves language.

Adopted new §851.108 and §851.109 are consistent with existing rules, and adopted new §851.110 improves language.

Adopted new §851.111 specifies that a Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm may reveal confidences and private information only with a fully informed client's or employer's consent, or when required by law, rule or court order or when those confidences, if left undisclosed, would constitute a threat to the health, safety or welfare of the public; specifies that a Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm shall not use a confidence or private information regarding a client or employer to the disadvantage of such client or employer or for the advantage of a third party; and specifies that a Professional Geoscientist or Geoscience Firm shall exercise reasonable care to prevent unauthorized disclosure or use of private information or confidences concerning a client or employer by the Professional Geoscientist's or Geoscience firm's employees and associates.

Adopted new §851.112 specifies that a Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm shall make written reports to the Board office within thirty (30) days of the following, as applicable: (1) a change of mailing address; (2) a change or additional place of full or part-time employment; (3) the initiation of independent practice as an unincorporated sole-proprietorship (a single owned Professional Geoscientist's geoscience business that has no separate legal existence from its owner) registered by the Board to engage in the public practice of geoscience; (4) the initiation of practice as any other type of firm, corporation, partnership (whether or not the partnership is an incorporated entity) or other business entity registered by the Board to engage in the public practice of geoscience; (5) The notification in paragraphs (1) - (4) of this subsection shall include full legal trade or business name of the association or employment, physical location and mailing address of the business, status of business (corporation, assumed name, partnership, or self-employment through use of own name), legal relationship and position of responsibility within the business, telephone number of the business office, effective date of this change, and reason for this notification (changed employment or retired; firm went out of business or changed its name or location, etc.) and information regarding areas of practice within

each employment or independent sole practitioner practice setting; (6) a change of business phone number, an additional business phone number, or a change in the home phone number; (7) a criminal conviction, other than a Class C misdemeanor traffic offense, of the licensee, Geoscientist-in-Training, or Authorized Official of a Firm; (8) the settlement of or judgment rendered in a civil lawsuit filed against the licensee or firm and relating to the Professional Geoscientist's or Geoscience Firm's professional practice; or (9) final actions against the Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm done by a licensing or certification body related to the practice of geoscience when known by the licensee; to specify that information received under this rule may be used by the Board to determine whether disciplinary action should be taken against a Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm; and to specify that failure to make a report as required by this rule is grounds for disciplinary action by the Board.

Adopted new §851.113 specifies that an independent practice by a Professional Geoscientist may be incorporated in accordance with the Professional Corporation Act, or other applicable law; specifies that when an assumed name is used in any practice of geoscience, the name of the Professional Geoscientist must be listed in conjunction with the assumed name; specifies that an assumed name used by a Professional Geoscientist must not be false, deceptive, or misleading.

Adopted new §851.114 specifies that a Professional Geoscientist: (a) Shall display the license certificate issued by the Board in a prominent place at each location of practice; (b) Shall display only an original of the license certificate issued by the Board; (c) Shall not make any alteration to a license certificate issued by the Board; (d) Shall not display a license certificate issued by the Board, which has been reproduced or is expired, suspended, or revoked; (e) Who elects to copy or allows to be copied a license certificate issued by the Board takes full responsibility for the use or misuse of the reproduced license.

Adopted new §851.151 specifies that the Board may impose appropriate sanctions against a Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm for: (1) the practice of fraud or deceit in obtaining a Professional Geoscientist license, Geoscientist-in-Training certification, or Geoscience Firm registration; (2) incompetence, misconduct, fraud, gross negligence, or repeated incidents of negligence in the public practice of geoscience; (3) conviction of a license holder or Authorized Official of a Firm of a crime involving moral turpitude or a felony; (4) the imposition of an administrative or civil penalty or a criminal fine, or imprisonment or probation instead of a fine, for a misdemeanor relating to or arising out of the public practice of geoscience; (5) the issuance of a cease and desist order or a similar sanction relating to or arising out of the public practice of geoscience; (6) using the seal of another license holder or using or allowing the use of the license holder's seal on geoscientific work not performed by or under the supervision of the license holder; (7) aiding or abetting a person or firm in a violation of this chapter; (8) the revocation or suspension of a license or firm registration, the denial of renewal of a license or registration, or other disciplinary action taken by a state agency, Board of registration, or similar licensing agency for Professional Geoscientists, Geoscientists-in-Training, Geoscience Firms, or a profession or occupation related to the public practice of geoscience; (9) practicing or offering to practice geoscience or representing to the public that the person or the person's firm or corporation is licensed or registered or qualified to practice geoscience if the person or firm is not licensed or registered under this chapter or the person's firm or corporation does not employ a Professional Geoscientist as required under this chapter; or (10) violating this chapter, a rule adopted under this chapter, including the code of professional conduct, or a comparable provision of the laws or rules regulating the practice of geoscience in another state or country; and improves language.

Adopted new §851.152 removes existing subsections (a) and (b) because the content of the subsections is moved to or are otherwise addressed in existing language or adopted changes to §851.30; specifies that a Geoscience Firm shall ensure that all geoscience work is done by or under the supervision of a Professional Geoscientist; specifies that a Geoscience Firm that obtains a new certificate of authority from the Office of Secretary of State (SOS) or files a new Assumed Name Certificate with the County Clerk must provide the new instrument number to the Board within thirty (30) days of the action; specifies that all geoscience documents released, issued, or submitted by or for a Geoscience Firm, including preliminary documents, must clearly indicate the firm name and registration number; specifies that the Board may revoke or suspend a Geoscience Firm's registration, place on probation a firm whose registration has been suspended, reprimand a Geoscience Firm, or assess an administrative penalty against a Geoscience Firm for a violation of any provision of these rules or the Act by the firm or any employee of the firm; specifies that the Board also may take action against an applicant pursuant to §851.110 of this chapter (relating to Effect of Enforcement Proceedings on Application); specifies that upon a finding of professional misconduct, the Board may consider but is not limited to the following factors in determining an appropriate sanction or sanctions against a Geoscience Firm: (1) the seriousness of the conduct, including the hazard or potential hazard to the health or safety of the public; (2) the economic damage or potential damage to property caused by the misconduct; (3) the respondent's history concerning previous grounds for sanction; (4) the sanction necessary to deter future misconduct; (5) efforts to correct the misconduct; and (6) any other matter justice may require; and improves language and renumbers the section accordingly. The adoption also adds subsection (l) which specifies that a Geoscience Firm shall maintain a work environment that uses standard operating procedures and quality assurance/quality control standards related to the Geoscience Firm's practice to ensure that the Geoscience Firm protects the health, safety, property and welfare of the public.

Adopted new §851.153 will change the title of the section to "Professional Geoscientist Compliance" and to improve language.

Sections §851.154 and §851.155 are repealed because the requirements in those sections will be incorporated into adopted new §851.112.

Adopted new §851.156 changes the title of the section to "Professional Geoscientist's Seals;" specifies that a license holder is not required to use a seal for a work product for which the license holder is not required to hold a license under Texas Occupations Code, Chapter 1002; specifies that all geoscience documents released, issued, or submitted by a licensee shall clearly indicate the Geoscience Firm name and registration number by which the Professional Geoscientist is employed; specifies that if the Professional Geoscientist is employed by a local, State, or Federal Government agency or a firm that is exempt from the requirement of registration under Texas Occupations Code, Chapter 1002, Subchapter H, then only the name of the agency shall be required; and improves language.

Adopted new §851.157 changes the title of the section to "Complaints and Disciplinary Actions;" specifies that a complaint may be filed with the Board by a member of the public, a member of the Board or by agency staff. Complaints against a person or entity whose activities are regulated by the Board must be made in writing, sworn to by the person making the complaint, and filed with the Secretary-Treasurer of the Board at the office of the Board in Austin; specifies that a complaint may be filed against any person who: holds a Professional Geoscientist license issued by the Board and/or is the Authorized Official of a Firm registered by the Board, is a registered Geoscience Firm, or holds a certificate as a Geoscientist-in-Training issued by the Board; specifies that a complaint may also be filed against a person or firm that is not licensed or registered with the Board alleging that the person or firm has engaged in the unlicensed or unregistered public practice or offering of geoscientific services in Texas; specifies that a complaint must be filed within two (2) years of the event giving rise to the complaint; specifies that the event giving rise to the complaint is an event from which a concern with geoscience work completed becomes apparent; specifies that complaints filed after the above stated period will not be accepted by the Board unless the Complainant can show good cause to the Board for the late filing; specifies that complaints and investigations under this chapter are of two types: (1) complaints received from a member of the public; and (2) complaints and investigations that are initiated by the Board as a result of information that becomes known to the Board or agency staff and that may indicate a violation; specifies that the agency provides a complaint form which should be used to file a complaint; specifies that a complaint from a member of the public must be in writing, sworn to by the person making the complaint, and filed with the Secretary-Treasurer; specifies that a complaint that is initiated by a member of the Board or agency staff must be made in writing and signed by the person who became aware of information that may indicate a violation; specifies that the Board shall maintain the confidentiality of a complaint from the time of receipt through the conclusion of the investigation of the complaint and that complaint information is not confidential after the date formal charges are filed; specifies that if a complaint is determined to be frivolous or without merit, the complaint and other information related to the complaint are confidential and that the information is not subject to discovery, subpoena, or other disclosure; specifies that a complaint is considered to be frivolous if the Executive Director and investigator, with Board approval, determine that the complaint was made for the likely purpose of harassment, and does not demonstrate apparent harm to any person; specifies that the Board shall take disciplinary action against a Geoscience Firm or Geoscientist-in-Training; specifies the disciplinary actions that may be imposed by the Board; removes subsections (d) - (e) which described disciplinary adjudication procedures that are no longer current and that would be maintained in agency procedures; improves language, and renumbers the sections accordingly.

Adopted new §851.158 specifies that a non-license holder who is assessed an administrative penalty may exercise due process rights under the Texas Occupations Code, Chapter 1002, Subchapter J; specifies that the Board may also seek an injunction as provided under the Texas Occupations Code, Chapter 1002, Subchapter K; and removes language which described investigation and disciplinary adjudication procedures that are no longer current and that would be maintained in agency procedures.

Adopted new §§851.201 - 851.208, 851.211 - 851.213, 851.215, 851.219 - 851.221, 851.229, 851.231, 851.234 - 851.236, and 851.238 - 851.243 improves language.

Adopted new §851.209, 851.210, 851.214, 851.216 - 851.218, 851.222 - 851.227, 851.230, 851.232 - 851.233, and 851.237 are consistent with existing rule.

Adopted new §851.228 changes the title of section to "Prepared or Prefiled Testimony."

COMMENTS

Comment: One individual commenter requested to add to the definition of "practice for the public" in §851.10(31)(B) to state that practice for the public does not include services provided for the express use of a firm or corporation by an employee or consultant if the firm or corporation assumes the ultimate liability "in writing" for the work product.

Board Response: The Board notes that the definition of "practice for the public" as it is currently written in rule is identical to the definition as written in the Texas Occupations Code, Chapter 1002. Additionally, the Board notes that there are many ways that responsibility in an agreement can be specified besides being solely in writing.

Comment: Another individual commenter requested adding the following language to §851.152, regarding Firm Compliance:

"A Geoscience Firm shall:

"(1) Designate an Authorized Official of a Geoscience Firm (AOF) responsible for submittal of the initial Geoscience Firm registration and maintaining compliance with this section. Should the designated AOF leave employment with the designating Geoscience Firm, or becomes unable or unwilling to continue in the AOF role, the Geoscience Firm shall designate another AOF and notify the Board within 30 days of the departure of the former AOF. The AOF shall function as a liaison between the Geoscience Firm and the Board regarding the geoscientific work product, ethics, professional development, sealing or other professional requirements.

"(2) Maintain a work environment that develops and uses standard operating procedures and quality assurance/quality control standards related to the Geoscience Firm's practice to ensure that the Geoscience Firm protects the health, safety, property and welfare of the public."

Board Response: The Board notes that the language in the first part of the request (item 1) is similar to language being adopted in §851.30(c) and should not be added to §851.152. The Board agrees with the language suggested in item 2, and adds the following language as §851.152(l): "A Geoscience Firm shall maintain a work environment that uses standard operating procedures and quality assurance/quality control standards related to Geoscience Firm's practice to ensure that the Geoscience Firm protects the health, safety, property, and welfare of the public." Further, the Board recommends that the definition of an Authorized Official of a Firm be amended to capitalize the words "Official" and "Firm" and that the acronym "AOF" be placed in parentheses following the term in the definitions at §851.10 and that every reference to the "Authorized Official of a Firm" either be capitalized or the acronym "AOF" be used elsewhere in the Board's rules. Further, the Board recommends that §851.112 be amended to add the requirement that a Geoscience Firm shall report to the Board within 30 days a change in the name and communication numbers of the AOF and each officer or director

or P.G. employed by the agency (the information collected on the initial firm registration application).

Comment: The Texas Association of Professional Geoscientists (TAPG) and the Houston Geological Society (HGS) submitted comments in reference to §851.30(c)(2), regarding the Authorized Official of a Firm and clarification of their responsibilities: Does the authorized official need to be a P.G. and will that person assure that the P.G. is complying with all rules and regulations, including which documents should or should not be signed? Or, is this simply a position to be used only to ensure that the firm is in compliance? If the authorized official can tell the P.G. which documents to sign, that constitutes oversight of a P.G., which contradicts the regulations, especially if the AOF isn't a P.G.

Board Response: The Board notes that the comment does not include a requested change to the adopted rule, but agrees that further clarification of these issues may be warranted. The Board is looking into whether the clarification might be handled satisfactorily through an item on the Frequently Asked Questions section on the agency's website.

Comment: TAPG and HGS submitted comments in reference to §851.156(g), regarding the use of a P.G. seal, and if someone needs to provide multiple original copies of a report to clients and State Agencies, whether it is permissible to stamp the first copy and then make the required number of copies, so long as each of the copies contains original signatures and are signed immediately after the copies are made? This would be different from printing multiple forms that could be filled in with information later on because all information is printed on the page prior to sealing and copying.

Board Response: The Board notes that the comment proposes a question regarding the use of a P.G. seal and how copies can be appropriately made. The Board response to the question is yes; those types of copies would be permissible.

Comment: TAPG and HGS submitted comments in reference to §851.156(j), regarding the use of a P.G. seal in the rule "A seal must be added on such work if required by the entity receiving the work; otherwise it may be added at the Professional Geoscientist's discretion". The term 'entity' is not defined and could be anyone: a client, a state official, or a court of law, for example. Allowing anybody receiving a geological work to request it to be sealed places an undue burden of responsibility on the P.G. An entity can ask for a document to be sealed, but if a seal is not required by law or regulation, then sealing it should only be done at the discretion of the P.G.

Board Response: The Board notes that this requirement currently exists in rule, but that this issue merits further discussion. The Board will study this issue further through its General Issues committee.

Comment: TAPG and HGS submitted comments in reference to §851.157, regarding the filing of complaints. The rule states that complaints must be filed within two years of the event giving rise to the complaint. Does the clock start only at the date of the incident? What of a case where a lawsuit is involved? It could be years before it's settled in Court and the results could determine if the complaint is worth pursuing. Can the Board decide a case that's under litigation? What if the Board finds the Geologist guilty, but the Court finds that, based on the Geologist's work, the defendant of the lawsuit wins? They propose that, in the case of complaints that involve litigated cases, the clock should start after the lawsuit has reached a conclusion.

Board Response: The Board respectfully disagrees with this suggested change; litigation may take years to be resolved. The Board notes that discretion may be exercised as to the acceptance of complaints after two years if "cause" is given by the complainant. Section 851.157(b) as adopted adds: "Complaints filed after the above stated period will not be accepted by the Board unless the Complainant can show good cause to the Board for the late filing."

SUBCHAPTER A. LICENSING

22 TAC §§851.20, 851.21, 851.23 - 851.25, 851.27 - 851.32, 851.40 - 851.46, 851.80

The adopted repeals are authorized by the Texas Occupations Code §1002.151 which provides that the Board shall adopt and enforce rules consistent with the Texas Geoscience Practice Act (the Act); §1002.101 which provides that the Board shall appoint an Executive Director who shall be responsible for managing the day to day affairs of the Board; §1002.151 which provides that the Board shall adopt and enforce rules consistent with the Act; §§1002.251 - 1002.264, 1002.301, and 1002.302 which provide that unless exempted by the Act a license is required to engage in the public practice of geoscience and specifies qualifications for and conditions of licensure and license renewal; §1002.351 which provides that the Board may adopt rules relating to the public practice of geoscience by a firm or corporation; and §1002.352 which provides that the Board shall establish a criteria by which a person who expresses an intent to become licensed as a Professional Geoscientist may register with the Board as a Geoscientist-in-Training.

The adopted repeals affect Texas Occupations Code Chapter 1002.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 17, 2010.

TRD-201006567
Charles Horton
Deputy Executive Director
Texas Board of Professional Geoscientists
Effective date: December 15, 2010
Proposal publication date: July 16, 2010
For further information, please call: (512) 936-4405

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SUBCHAPTER B. CODE OF PROFESSIONAL CONDUCT

22 TAC §§851.101 - 851.110

The adopted repeals are authorized by the Texas Occupations Code §1002.151 which provides that the Board shall adopt and enforce rules consistent with the Texas Geoscience Practice Act (the Act); §1002.153 which provides that the Board by rule shall adopt a code of professional conduct that is binding on all license holders; §§1002.401 - 1002.405 which provide for license denial and disciplinary procedures; §§1002.451 - 1002.453 which provide the imposition of an administrative penalty against a person licensed by the Board or a person who violates the Act or a rule

adopted under the authority of the Act; and §1002.154 which provides that the Board shall enforce the Act.

The adopted repeals affect Texas Occupations Code Chapter 1002.

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SUBCHAPTER C. COMPLIANCE AND ENFORCEMENT

22 TAC §§851.151 - 851.158

The adopted repeals are authorized by the Texas Occupations Code §1002.101 which provides that the Board shall appoint an Executive Director who shall be responsible for managing the day to day affairs of the Board; §1002.151 which provides that the Board shall adopt and enforce rules consistent with the Texas Geoscience Practice Act (the Act); §1002.154 which provides that the Board shall enforce the Act; §1002.202 which provides that a person may file a complaint alleging a violation of the Act or a rule adopted under the authority of the Act, that the complaint may be initiated by the Board or Board staff, and provides for confidentiality of a complaint filed with the Board; §1002.204 which provides for complaint investigation and disposition; §§1002.251 - 1002.264, 1002.301, and 1002.302 which provide that unless exempted by the Act a license is required to engage in the public practice of geoscience and specifies qualifications for and conditions of licensure; §1002.351 which provides that the Board may adopt rules relating to the public practice of geoscience by a firm or corporation; §1002.352 which provides that the Board shall establish a criteria by which a person who expresses an intent to become licensed as a Professional Geoscientist may register with the Board as a Geoscientist-in-Training; §§1002.401 - 1002.405 which provide for license denial and disciplinary procedures; and §§1002.451 - 1002.453 which provide the imposition of an administrative penalty against a person licensed by the Board or a person who violates the Act or a rule adopted under the authority of the Act.

The adopted repeals affect Texas Occupations Code Chapter 1002.

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SUBCHAPTER D. HEARINGS--CONTESTED CASES

22 TAC §§851.201 - 851.243

The adopted repeals are authorized by the Texas Occupations Code §1002.101 which provides that the Board shall appoint an Executive Director who shall be responsible for managing the day to day affairs of the Board; §1002.151 which provides that the Board shall adopt and enforce rules consistent with the Texas Geoscience Practice Act (the Act); §1002.154 which provides that the Board shall enforce the Act; §1002.202 which provides that a person may file a complaint alleging a violation of the Act or a rule adopted under the authority of the Act; §1002.204 which provides for complaint investigation and disposition; §§1002.401 - 1002.405 which provide for license denial and disciplinary procedures; and §§1002.451 - 1002.453 which provide the imposition of an administrative penalty against a person licensed by the Board or a person who violates the Act or a rule adopted under the authority of the Act.

The adopted repeals affect Texas Occupations Code Chapter 1002.

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CHAPTER 851. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS LICENSING AND ENFORCEMENT RULES

SUBCHAPTER A. DEFINITIONS

22 TAC §851.10

STATUTORY AUTHORITY

The adopted amendments are authorized by the Texas Occupations Code §1002.101 which provides that the Board shall appoint an Executive Director who shall be responsible for managing the day to day affairs of the Board; §1002.151 which provides that the Board shall adopt and enforce rules consistent with the Texas Geoscience Practice Act (the Act); §1002.153 which pro-

vides that the Board by rule shall adopt a code of professional conduct that is binding on all license holders; §1002.154 which provides that the Board shall enforce the Act; §1002.202 which provides that a person may file a complaint alleging a violation of the Act or a rule adopted under the authority of the Act, that the complaint may be initiated by the Board or Board staff, and provides for confidentiality of a complaint filed with the Board; §1002.204 which provides for complaint investigation and disposition; §§1002.251 - 1002.264, 1002.301, and 1002.302 which provide that unless exempted by the Act a license is required to engage in the public practice of geoscience and specifies qualifications for and conditions of licensure and license renewal; §1002.351 which provides that the Board may adopt rules relating to the public practice of geoscience by a firm or corporation; §1002.352 which provides that the Board shall establish a criteria by which a person who expresses an intent to become licensed as a Professional Geoscientist may register with the Board as a Geoscientist-in-Training; §§1002.401 - 1002.405 which provide for license denial and disciplinary procedures; and §§1002.451 - 1002.453 which provide the imposition of an administrative penalty against a person licensed by the Board or a person who violates the Act or a rule adopted under the authority of the Act.

The adopted amendments affect Texas Occupations Code Chapter 1002.

§851.10. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

(1) Act--Texas Occupations Code, Chapter 1002, cited as the Texas Geoscience Practice Act.

(2) Accredited institutions or programs--An institution or program which holds accreditation or candidacy status from an accreditation organization recognized by the Council for Higher Education Accreditation (CHEA) or other appropriate accrediting entity accepted by the Board.

(3) Address of record--In the case of a person licensed, certified, or registered by the Board, the address which is filed by the licensee or registrant with the Board.

(4) Advertising or Advertisement--Any non-commercial or commercial message, including, but not limited to verbal statements, bids, web pages, signage, provider listings, and paid advertisement which promotes the services of a licensee.

(5) Agency or Board--Texas Board of Professional Geoscientists.

(6) Applicant--A person making application for a geoscience license; a firm and/or the Authorized Official of a Firm; or a person making application for the Geoscientist-in-Training (GIT) certification.

(7) Application--The forms, information, attachments, and fees necessary to obtain a license as a Professional Geoscientist, the registration of a firm, or a certification as a Geoscientist-in-Training (GIT).

(8) Authorized Official of a Firm (AOF)--The person designated by a Geoscience Firm to be responsible for the process of submitting the application for the initial registration of the firm with the Board; ensuring that the firm maintains compliance with the requirements of registration with the Board; ensuring that the firm complies with all laws, codes, rules, and standards applicable to the public practice of geoscience; ensuring that the firm renews its registration status as long as the firm offers or provides public geoscientific services; and communicating with the Board regarding any matter.

(9) Certificant--An individual holding a certificate as a Geoscientist-in-Training.

(10) Cheating--Attempting to obtain, obtaining, providing, or using answers to examination questions by deceit, fraud, dishonesty, or deception.

(11) Complainant--Any person who has filed a sworn, written complaint with the Secretary-Treasurer of the Board against any person whose activities are subject to the jurisdiction of the Board or the Executive Director, a staff member, or member of the Board who has filed a signed, written complaint after becoming aware of information that may indicate a violation.

(12) Complaint--An allegation or allegations of wrongful activity related to the practice or offering of geoscience services in Texas. A complaint is within the Board's jurisdiction if the complaint alleges a violation of statutes or rules applicable to the public practice of geoscience or the requirements of licensure of a Professional Geoscientist (P.G.) or registration by an individual, firm, or other legal entity. The Board maintains jurisdiction over a license, registration or certification it issues as long as the license, registration or certification is current or renewable.

(13) Default--The failure of the Respondent to appear in person or by legal representative on the day and at the time set for hearing in a contested case or informal conference, or the failure to appear by telephone, in accordance with the notice of hearing or notice of informal conference. Default results in the actions being taken that were described in the notice of the hearing for a contested case or informal conference in the event of a failure to appear.

(14) Direct supervision--Critical watching, evaluating, and directing of geoscience activities with the authority to review, enforce, and control compliance with all geoscience criteria, specifications, and procedures as the work progresses. Direct supervision will consist of an acceptable combination of: exertion of significant control over the geoscience work, regular personal presence, reasonable geographic proximity to the location of the performance of the work, and an acceptable employment relationship with the supervised persons.

(15) Discipline--One of three recognized courses of study under which a person may qualify for a license as a Professional Geoscientist. Geoscience is comprised of the following disciplines: geology, geophysics, and soil science.

(16) Executive Director--The Executive Director of the Texas Board of Professional Geoscientists.

(17) Filed date--The date that the document has been received by the Board or, if the document has been mailed to the Board, the postmark date of the document.

(18) Geology--The discipline of geoscience that addresses the science of the origin, composition, structure, and history of the earth and its constituent soils, rocks, minerals, fossil fuels, solids, fluids and gasses, and the study of the natural and introduced agents, forces, and processes that cause changes in and on the earth, and is applied with judgment to develop ways to utilize, economically, those natural and introduced agents, forces, and processes for the benefit of mankind. There are many subdivisions of geology, which include, but are not limited to the following: historical geology, physical geology, economic geology, mineralogy, paleontology, structural geology, mining geology, petroleum geology, physiography, geomorphology, geochemistry, hydrogeology, petrography, petrology, vulcanology, stratigraphic geology, engineering geology, and environmental geology.

(19) Geophysics--Refers to that science which involves the study of the physical earth by means of measuring its natural and induced fields of force, including, but not limited to, electric, gravity and magnetic, and its responses to natural and induced energy or forces, the interpretation of these measurements, applied with judgment to benefit or protect the public.

(20) Geoscience--The science of the earth and its origin and history, the investigation of the earth's environment and its constituent soils, rocks, minerals, fossil fuels, solids, and fluids, and the study of the natural and introduced agents, forces, and processes that cause changes in and on the earth as applied with professional judgment to develop ways to utilize, economically, those natural and introduced agents, forces, and processes for the benefit of the public.

(21) Geoscience Firm--A firm, corporation, or other business entity registered by the Board to engage in the public practice of geoscience. Firms are recognized by the Board in one of the following categories:

(A) An unincorporated sole-proprietorship (a single owned Professional Geoscientist's geoscience business that has no separate legal existence from its owner) registered by the Board to engage in the public practice of geoscience; or

(B) Any other type of firm, corporation, partnership (whether or not the partnership is an incorporated entity) or other business entity registered by the Board to engage in the public practice of geoscience.

(22) License--The legal authority granted the holder to actively practice geoscience upon meeting the requirements as set out in the Act and this chapter.

(23) License certificate--Any certificate issued by the Board showing that a license, registration, or certificate has been granted by the Board. A certificate is not valid unless it is accompanied by a card issued by the Board which shows the expiration date of the license, registration or certification.

(24) License status--The status of a Professional Geoscientist license is one of the following:

(A) Current license--A license that has not expired.

(B) Expired license--A license that has been expired for less than three years and is therefore renewable.

(C) Permanently expired license--A license that has been expired for more than three years and is no longer renewable.

(25) Licensee--An individual holding a current Professional Geoscientist license in a discipline appropriate to the work performed under the Act and this chapter.

(26) Person--Any individual, firm, partnership, corporation, association, governmental subdivision, or public or private organization of any character other than an agency.

(27) Professional geoscience--Professional service which may include consultation, investigation, evaluation, planning, designing, or direct supervision of construction, in connection with any public or private projects wherein the public welfare, or the safeguarding of life, health, and property is concerned or involved, when such professional service requires the application of geoscience principles and the interpretation of geoscience data.

(28) Professional geoscience services (also geoscientific services)--Services which must be performed by or under the direct supervision of a Professional Geoscientist and which meet the definition of the practice of geoscience as defined in the Texas Occupations Code, §1002.002(3). A service shall be conclusively considered a professional geoscience service if it is delineated in that section; other services requiring a Professional Geoscientist by contract, or services where the adequate performance of that service requires a geoscience education, training, or experience in the application of special knowledge or judgment of the geological, geophysical or soil sciences to that service shall also be conclusively considered a professional geoscience service.

(29) Professional Geoscientist or P.G.--A person who holds a license issued by the Board.

(30) Protestant--Any party opposing an application or petition filed with the Board.

(31) Practice for the public--

(A) Providing professional geoscience services:

(i) For a governmental entity in Texas;

(ii) To comply with a rule established by the State of Texas or a political subdivision of the State of Texas; or

(iii) For the public or a firm or corporation in the State of Texas if the practitioner accepts ultimate liability for the work product; and

(B) Does not include services provided for the express use of a firm or corporation by an employee or consultant if the firm or corporation assumes the ultimate liability for the work product.

(32) The Public--Any individual(s), client(s), business or public entities, or any member of the general population whose normal course of life might reasonably include an interaction of any sort with or be impacted by geoscientific work.

(33) Registered firm--A firm that is currently registered with the Board.

(34) Registrant--A person whose sole-proprietorship is currently registered with the Board or a firm or the Authorized Official of a Firm that is currently registered with the Board.

(35) Respondent--Any person, licensed or unlicensed, who has been charged with violating any provision of the Act or a rule or order issued by the Board.

(36) Responsible charge--The independent control and direction of geoscientific work or the supervision of geoscientific work by the use of initiative, skill, and independent judgment.

(37) Soil Science--Soil science means the science of soils, their classification, origin and history, the investigation of physical, chemical, morphological, and biological characteristics of the soil including among other things, their ability to produce vegetation and the fate and movement of physical, chemical, and biological contaminants.

(38) Sole-proprietorship--A single owned Professional Geoscientist's geoscience business that has no separate legal existence from its owner.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Charles Horton
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SUBCHAPTER B. P.G. LICENSING, FIRM REGISTRATION, AND GIT CERTIFICATION

22 TAC §§851.20, 851.21, 851.23 - 851.25, 851.27 - 851.32, 851.40 - 851.46, 851.80

The adopted new rules are authorized by the Texas Occupations Code §1002.151 which provides that the Board shall adopt and enforce rules consistent with the Texas Geoscience Practice Act (the Act); §1002.101 which provides that the Board shall appoint an Executive Director who shall be responsible for managing the day to day affairs of the Board; §1002.151 which provides that the Board shall adopt and enforce rules consistent with the Texas Geoscience Practice Act (the Act); §§1002.251 - 1002.264, 1002.301, and 1002.302 which provide that unless exempted by the Act a license is required to engage in the public practice of geoscience and specifies qualifications for and conditions of licensure and license renewal; §1002.351 which provides that the Board may adopt rules relating to the public practice of geoscience by a firm or corporation; §1002.352 which provides that the Board shall establish a criteria by which a person who expresses an intent to become licensed as a Professional Geoscientist may register with the Board as a Geoscientist-in-Training.

The adopted new rules affect Texas Occupations Code Chapter 1002.

§851.30. Firm Registration.

(a) Registration required: Unless an exemption applies, as outlined in Texas Occupations Code §1002.351(b), a firm or corporation may engage in the public practice of geoscience only if the firm is currently registered with the Board; and

(1) The geoscientific work is performed by, or under the supervision of, a Professional Geoscientist who is in responsible charge of the work and who signs and seals all geoscientific reports, documents, and other records as required by this chapter; or

(2) The business of the firm or corporation includes the public practice of geoscience as determined by Board rule and a principal of the firm or an officer or director of the corporation is a Professional Geoscientist and has overall supervision and control of the geoscientific work performed in this state. As provided in §851.10(21) of this chapter, the term firm includes corporations, sole-proprietorships, partnerships and/or joint stock associations. For the purposes of this section, the term public includes but is not limited to political subdivisions of the state, business entities, and individuals. The Board has the authority under the Act to issue an annual certificate of registration to applicants that, subsequent to review and evaluation, are found to have met all requirements of the Act and Board rules. The Board has the authority under the Act to deny a certificate of registration to any applicant found not to have met all requirements of the Act and Board rules. This section does not apply to an engineering firm that performs service or work that is both engineering and geoscience. For the purpose of fees, Geoscience Firms are categorized as either:

(A) An unincorporated sole-proprietorship (a single owned Professional Geoscientist's geoscience business that has no separate legal existence from its owner) registered by the Board to engage in the public practice of geoscience; or

(B) Any other type of firm, corporation, partnership (whether or not the partnership is an incorporated entity) or other business entity registered by the Board to engage in the public practice of geoscience.

(b) Unless registered by the Board or exempt from registration under Texas Occupations Code §1002.351, an individual, firm, or corporation may not represent to the public that the individual, firm, or corporation is a Professional Geoscientist or able to perform geoscientific services or prepare a geoscientific report, document, or other record that requires the signature and seal of a license holder under Texas Occupations Code §1002.263(b).

(c) Registration requirements: In order to be eligible to register as a Geoscience Firm with the Board, the firm must:

(1) Affirm and demonstrate that the firm is an unincorporated sole-proprietorship or another business entity that offers or performs work that includes the public practice of geoscience;

(2) Identify an Authorized Official of a Firm who shall be responsible for: the process of submitting the application for the initial registration of the firm with the Board; ensuring that the firm maintains compliance with the requirements of registration with the Board; ensuring that the firm complies with all laws, codes, rules, and standards applicable to the public practice of geoscience; ensuring that the firm renews its registration status as long as the firm offers or provides public geoscientific services; and communicating with the Board regarding any matter;

(3) Operate under a business model such that:

(A) The geoscientific work is performed by, or under the supervision of, a licensed Professional Geoscientist who is in responsible charge of the work and who signs and seals all geoscientific reports, documents, and other records as required by this chapter; or

(B) The principal business of the firm or corporation is the public practice of geoscience as determined by Board rule and a principal of the firm or an officer or director of the corporation is a licensed Professional Geoscientist and has overall supervision and control of the geoscientific work performed in this state;

(4) Identify the business model and the Professional Geoscientist who fulfills the role of the licensed Professional Geoscientist in paragraph (3) of this subsection;

(5) Unless the firm is an unincorporated sole-proprietorship or an unincorporated partnership, a firm seeking registration with the Board must register the firm with the Office of the Secretary of State (SOS) and obtain a certificate of authority. If the firm operates under a name other than that which is filed with the SOS, an Assumed Name Certificate must be filed with the County Clerk. A firm's SOS certificate of authority number and all Assumed Name Certificate instrument numbers must be provided to the Board upon initial application. If the firm is a sole-proprietorship and the firm operates under a name that does not include the last name of the individual sole proprietor, the firm shall file an Assumed Name Certificate with the County Clerk;

(6) Submit an application for registration of a firm (form C), in accordance to the procedures outlined in subsection (d) of this section;

(7) A firm that offers or performs professional geoscience services only on a part-time basis must ensure that the Professional

Geoscientist who performs the geoscientific work or who directly supervises the geoscientific work while the firm is in operation has physical presence and is a regular full-time employee of the firm. An active licensee who is a sole proprietor shall satisfy the requirement of the regular full-time employee;

(8) Upon initial application, a firm shall affirm that the licensed Professional Geoscientist performing or supervising the geoscientific work for a Geoscience Firm is a regular full-time employee. A Geoscience Firm shall provide evidence of the full-time employment status upon request of the Board. This subsection does not prohibit a licensed Professional Geoscientist from performing consulting geoscience services on a part-time basis as an individual. A Geoscience Firm shall provide that at least one regular full-time Professional Geoscientist employee directly supervise all geoscience work performed in branch, remote, or project offices. If such a branch, remote or project office is normally staffed full-time while performing geoscience work or is represented by the firm as a permanent full-time office, then at least one regular full-time Professional Geoscientist must be physically present in each such office.

(d) Firm Registration Application Process.

(1) The Authorized Official of a Firm shall complete and submit, along with the required application fee, the form furnished by the Board which includes but is not limited to the following information listed in subparagraphs (A) - (E) of this paragraph:

(A) The name, address, and communication number of the firm offering to engage or engaging in the practice of professional geoscience for the public in Texas;

(B) The name, position, address, and communication numbers of each officer or director;

(C) The name, address and current active Texas Professional Geoscientist license number of each regular, full-time geoscience employee performing geoscientific work for the public in Texas on behalf of the firm;

(D) The name, location, and communication numbers of each subsidiary or branch office offering to engage or engaging in the practice of professional geoscience for the public in Texas, if any; and

(E) A signed statement attesting to the correctness and completeness of the application.

(2) Upon receipt of all required materials and fees and having satisfied requirements in this section, the firm shall be registered and a unique Geoscience Firm registration number shall be assigned to the firm registration. The new firm registration shall be set to expire at the end of the calendar month occurring one year after the firm registration is issued.

(3) An application is active for one year including the date that it is filed with the Board. After one year an application expires.

(4) Obtaining or attempting to obtain a firm registration by fraud or false misrepresentation is grounds for an administrative sanction and/or penalty.

(5) Applications are not reviewed until the application and fee have been received in the TBPG office. Applicants are initially notified of any deficiencies in the application.

(6) Applicants should respond to a deficiency notice within forty-five (45) days from the date of notification for applicants to correct deficiencies. If an applicant does not respond to a deficiency notice or does not ensure that necessary documents are provided to the TBPG office, the application will expire as scheduled one year after the date it became active.

(e) The application fee will not be refunded.

(f) The initial certificate of registration shall be valid for a period of one year from the date it is issued, plus any days remaining through the end of that month. A renewed firm registration is valid for a period of one year from the expiration date of the firm registration being renewed.

(g) A Geoscience Firm's completed and approved registration is the legal authority granted the holder to actively offer or practice geoscience upon meeting the requirements as set out in the Act and these rules. When a firm registration is issued, a firm registration certificate, the first firm registration certificate expiration card, and the first portable firm registration card is provided to the new Geoscience Firm. The firm registration certificate shall bear the name of the firm, the firm's unique Geoscience Firm registration number, and the date the firm registration was originally issued. The firm registration certificate is not valid proof of current registration as a firm, unless the firm registration certificate expiration card is accompanying the firm registration certificate and the date on the firm registration certificate card is not expired. The firm registration certificate expiration card shall bear the name of the firm, the firm's unique firm registration license number, and the date the firm registration will expire, unless it is renewed. The portable firm registration card shall bear the name of the firm, the firm's unique Geoscience Firm registration number, the date the registration was originally issued, and the date the registration will expire, unless it is renewed.

(h) At least sixty (60) days in advance of the date of the expiration, the Board shall notify each firm holding a certificate of registration of the date of the expiration and the amount of the fee that shall be required for its renewal for one year. The certificate of registration may be renewed by completing the renewal application and paying the annual registration renewal fee set by the Board. It is the sole responsibility of the firm to pay the required renewal fee prior to the expiration date, regardless of whether the renewal notice is received.

(i) A certificate of registration which has been expired for less than one (1) year may be renewed by completing a firm registration renewal application; an affirmation signed by the Authorized Official of a Firm and the licensed Professional Geoscientist who performs or supervises the geoscience work for the firm indicating whether geoscientific services were offered, pending, or performed for the public in Texas when the firm's registration was expired and payment of a $50 late renewal penalty. If a firm under application for late firm registration renewal has met the requirements for renewal and has indicated that the geoscience services were offered, pending, or performed for the public in Texas while the firm's registration was expired, unless certain allegations of misconduct are present, the firm's registration shall be renewed. Information regarding unregistered geoscience practice received under this section shall be referred to the enforcement division for appropriate action that could include the initiation of a complaint by the Board.

(j) The application fee is non-refundable.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. CODE OF PROFESSIONAL CONDUCT

22 TAC §§851.101 - 851.114

The adopted new rules are authorized by the Texas Occupations Code §1002.151 which provides that the Board shall adopt and enforce rules consistent with the Texas Geoscience Practice Act (the Act); §1002.153 which provides that the Board by rule shall adopt a code of professional conduct that is binding on all license holders; §§1002.401 - 1002.405 which provide for license denial and disciplinary procedures; §§1002.451 - 1002.453 which provide the imposition of an administrative penalty against a person licensed by the Board or a person who violates the Act or a rule adopted under the authority of the Act; and §1002.154 which provides that Board shall enforce the Act.

The adopted new rules affect Texas Occupations Code Chapter 1002.

§851.101. General.

(a) This subchapter is promulgated pursuant to the Texas Geoscience Practice Act (the Act), Texas Occupations Code, §1002.153, which directs the Board to adopt a code of professional conduct that is binding on all license holders under the Act. Except as otherwise noted, this subchapter applies only to situations which are directly or indirectly related to the practice of geoscience.

(b) Any person who holds a Professional Geoscientist license and/or is the Authorized Official of a Firm (AOF), is a Geoscience Firm, or who holds a certificate as a Geoscientist-in-Training is responsible for understanding and complying with the Act, rules adopted by the Board and any other law or rule pertaining to the professional practice of geoscience. Any person under application for, currently holding, or eligible to renew a license, registration, or certification issued by the Board is bound by the provisions of the Act and this chapter.

(c) A Professional Geoscientist, an AOF, or a person who holds a certificate as a Geoscientist-in-Training having knowledge of any alleged violation of the Act and/or Board rules shall cooperate with the Board in furnishing such information as may be required.

(d) A Professional Geoscientist, an AOF, or a person who holds a certificate as a Geoscientist-in-Training shall promptly answer all inquiries concerning matters under the jurisdiction of the Board, and shall fully comply with final decisions and orders of the Board. Failure to comply with these matters shall constitute a separate offense of misconduct subject to the penalties provided under the Act.

(e) The Board may revoke or suspend a Professional Geoscientist's license, place on probation a Professional Geoscientist whose license has been suspended, reprimand a Professional Geoscientist, or assess an administrative penalty against a Professional Geoscientist for a violation of any provision of these rules of professional conduct or the Act. The Board also may take action against an Applicant pursuant to §851.110 of this chapter.

(f) Upon a finding of professional misconduct, the Board may consider but is not limited to the following factors in determining an appropriate sanction or sanctions:

(1) The seriousness of the conduct, including the hazard or potential hazard to the health or safety of the public;

(2) The economic or potential damage to property caused by the misconduct;

(3) The respondent's history concerning previous grounds for sanction;

(4) The sanction necessary to deter future misconduct;

(5) Efforts to correct the misconduct; and

(6) Any other matter justice may require.

(g) This subchapter is not intended to suggest or define standards of care in civil actions against Professional Geoscientists, Geoscientists-in-Training, or Geoscience Firms involving their professional conduct.

(h) A Professional Geoscientist, a Geoscientist-in-Training, or a Geoscience Firm may donate professional geoscience services to charitable causes but must adhere to all provisions of the Act and the rules of the Board in the provision of all geoscientific services rendered, regardless of whether the Professional Geoscientist, a Geoscientist-in-Training, or Geoscience Firm is paid for the services.

(i) A Professional Geoscientist who is presenting geoscientific testimony, including geoscientific interpretation, analysis, or conclusions, or recommending geoscientific work before any public body or court of law, whether under sworn oath or not, must adhere to all provisions of the Act and the rules of the Board in the provision of all geoscientific services rendered regardless of whether the Professional Geoscientist is paid for the service or is providing such service on behalf of themselves or some other organization for which their services are provided at no cost.

§851.106. Responsibility to the Regulation of the Geoscience Profession and Public Protection.

(a) Professional Geoscientists, Geoscientists-in-Training, and Geoscience Firms shall be entrusted to protect the health, safety, and welfare of the public in the practice of their profession.

(b) A Professional Geoscientist, a Geoscientist-in-Training, or Geoscience Firm shall not:

(1) Knowingly participate, directly or indirectly, in any plan, scheme, or arrangement having as its purpose the violation of any provision of the Act or the rules of the Board;

(2) Aid or abet, directly or indirectly:

(A) Any unlicensed person in connection with the unauthorized practice of geoscience;

(B) Any business entity in the practice of geoscience unless carried on in accordance with the Act and this chapter; or

(C) Any person or any business entity in the use of a professional seal or other professional identification so as to create the opportunity for the unauthorized practice of geoscience by any person or any business entity;

(3) Fail to exercise reasonable care or diligence to prevent his/her partners, associates, shareholders, and employees from engaging in conduct which, if done by a Professional Geoscientist, a Geoscientist-in-Training, or Geoscience Firm, would violate any provision of the Act or the rules of the Board.

(c) A Professional Geoscientist or a Geoscientist-in-Training possessing knowledge of an Applicant's qualifications for licensure shall cooperate with the Board by responding in writing to the Board regarding those qualifications when requested to do so by the Board.

(d) A Professional Geoscientist shall be responsible and accountable for the care, custody, control, and use of his/her Professional Geoscientist seal, professional signature, and other professional identification. A Professional Geoscientist whose seal has been lost, stolen, or otherwise misused shall report the loss, theft, or misuse to the Board immediately upon discovery of the loss, theft, or misuse. The Board may invalidate the license number of the lost, stolen, or misused seal upon the request of the Professional Geoscientist if the Board deems it necessary.

(e) A Professional Geoscientist, a Geoscientist-in-Training, or an Authorized Official of a Firm shall remain mindful of his/her obligation to the profession and to protect public health, safety, and welfare and shall report to the Board known or suspected violations of the Act or the rules of the Board.

(f) A Professional Geoscientist or Geoscience Firm shall keep adequate records of geoscientific services provided to the public for no less than five (5) years following the completion and final delivery of the service. Adequate records shall include, but not be limited to:

(1) Documents that have been signed and sealed or would require a signature and a seal;

(2) Relevant documentation that supports geoscientific interpretations, conclusions, and recommendations;

(3) Descriptions of offered services;

(4) Billing, payment, and financial communications; and

(5) Other relevant records.

(g) Professional Geoscientists, a Geoscientists-in-Training, and Geoscience Firms should strive to adequately examine the environmental impact of their actions and projects, including the prudent use and conservation of resources and energy, in order to make informed recommendations and decisions.

§851.111. Professional Geoscientists Shall Maintain Confidentiality of Clients.

(a) A Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm may reveal confidences and private information only with a fully informed client's or employer's consent, or when required by law, rule or court order; or when those confidences, if left undisclosed, would constitute a threat to the health, safety or welfare of the public.

(b) A Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm shall not use a confidence or private information regarding a client or employer to the disadvantage of such client or employer or for the advantage of a third party.

(c) A Professional Geoscientist or Geoscience Firm shall exercise reasonable care to prevent unauthorized disclosure or use of private information or confidences concerning a client or employer by the Professional Geoscientist's or Geoscience Firm's employees and associates.

§851.112. Required Reports to the Board.

(a) A Professional Geoscientist, Geoscientist-in-Training, or a Geoscience Firm shall make written reports to the Board office within thirty (30) days of the following, as applicable:

(1) Any changes in a firm's name, the Authorized Official of the Firm (AOF), the firm's owners, officers, or directors, Professional Geoscientist(s) employed by the firm, Professional Geoscientist(s) who serve as the P.G. in Responsible Charge for the firm or any branch offices, communication phone number(s) of the Authorized Official of the Firm or P.G.s and any other changes as identified in section 152 of this Chapter;

(2) Any changes in an individual P.G.'s or GIT's mailing address or other contact information and any changes in employment status with a firm (e.g. leaving or starting employment with a current firm, any new additional place(s) of employment, changes in full or part-time status);

(3) The initiation of independent practice as an unincorporated sole-proprietorship (a single-owned Professional Geoscientist's geoscience business that has no separate legal existence from its owner) registered by the Board to engage in the public practice of geoscience;

(4) The initiation of practice as any other type of firm, corporation, partnership (whether or not the partnership is an incorporated entity) or other business entity registered by the Board to engage in the public practice of geoscience;

(5) The notification in paragraphs (1) - (4) of this subsection shall include full legal trade or business name of the association or employment, physical location and mailing address of the business, status of business (corporation, assumed name, partnership, or self-employment through use of own name), legal relationship and position of responsibility within the business, telephone number of the business office, effective date of this change; and reason for this notification (changed employment or retired; firm went out of business or changed its name or location, etc.) and information regarding areas of practice within each employment or independent sole practitioner practice setting;

(6) A change of business phone number, an additional business phone number, or a change in the home phone number;

(7) A criminal conviction, other than a Class C misdemeanor traffic offense, of the licensee, Geoscientist-in-Training, or Authorized Official of a Firm (AOF);

(8) The settlement of or judgment rendered in a civil lawsuit filed against the licensee or firm and relating to the Professional Geoscientist's or Geoscience Firm's professional practice; or

(9) Final actions against the Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm done by a licensing or certification body related to the practice of geoscience when known by the licensee.

(b) The information received under subsection (a) of this section may be used by the Board to determine whether disciplinary action should be taken against a Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm.

(c) Failure to make a report as required by subsection (a) of this section is grounds for disciplinary action by the Board.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. COMPLIANCE AND ENFORCEMENT

22 TAC §§851.151 - 851.153, 851.156 - 851.158

The adopted new rules are authorized by the Texas Occupations Code §1002.101 which provides that the Board shall appoint an Executive Director who shall be responsible for managing the day to day affairs of the Board; §1002.151 which provides that the Board shall adopt and enforce rules consistent with the Texas Geoscience Practice Act (the Act); §1002.154 which provides that the Board shall enforce the Act; §1002.202 which provides that a person may file a complaint alleging a violation of the Act or a rule adopted under the authority of the Act, that the complaint may be initiated by the Board or Board staff, and provides for confidentiality of a complaint filed with the Board; §1002.204 which provides for complaint investigation and disposition; §§1002.251 - 1002.264, 1002.301, and 1002.302 which provide that unless exempted by the Act a license is required to engage in the public practice of geoscience and specifies qualifications for and conditions of licensure; §1002.351 which provides that the Board may adopt rules relating to the public practice of geoscience by a firm or corporation; §1002.352 which provides that the Board shall establish a criteria by which a person who expresses an intent to become licensed as a Professional Geoscientist may register with the Board as a Geoscientist-in-Training; §§1002.401 - 1002.405 which provide for license denial and disciplinary procedures; and §§1002.451 - 1002.453 which provide the imposition of an administrative penalty against a person licensed by the Board or a person who violates the Act or a rule adopted under the authority of the Act.

The adopted new rules affect Texas Occupations Code Chapter 1002.

§851.151. General.

(a) The Board will conduct inquiries into situations which allegedly violate the requirements of the Texas Geoscience Practice Act and Board rules concerning the practice of geoscience, representations which imply the legal capacity to offer or perform geoscience services for the public, and situations which are considered by the Board to pose or have caused harm to the public. Situations that represent a repeat offense, a danger or nuisance to the public or cannot be reasonably resolved through voluntary compliance will be disposed of by administrative proceedings as authorized by law.

(b) The Board may impose appropriate sanctions against a Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm for:

(1) The practice of fraud or deceit in obtaining a Professional Geoscientist license, Geoscientist-in-Training certification, or Geoscience Firm registration;

(2) Incompetence, misconduct, fraud, gross negligence, or repeated incidents of negligence in the public practice of geoscience;

(3) Conviction of a license holder or Authorized Official of a Firm of a crime involving moral turpitude or a felony;

(4) The imposition of an administrative or civil penalty or a criminal fine, or imprisonment or probation instead of a fine, for a misdemeanor relating to or arising out of the public practice of geoscience;

(5) The issuance of a cease and desist order or a similar sanction relating to or arising out of the public practice of geoscience;

(6) Using the seal of another license holder or using or allowing the use of the license holder's seal on geoscientific work not performed by or under the supervision of the license holder;

(7) Aiding or abetting a person or firm in a violation of this chapter;

(8) The revocation or suspension of a license or firm registration, the denial of renewal of a license or registration, or other disciplinary action taken by a state agency, Board of registration, or similar licensing agency for Professional Geoscientists, Geoscientists-in-Training, Geoscience Firms, or a profession or occupation related to the public practice of geoscience;

(9) Practicing or offering to practice geoscience or representing to the public that the person or the person's firm or corporation is licensed or registered or qualified to practice geoscience if the person or firm is not licensed or registered under this chapter or the person's firm or corporation does not employ a Professional Geoscientist as required under this chapter; or

(10) Violating this chapter, a rule adopted under this chapter, including the code of professional conduct, or a comparable provision of the laws or rules regulating the practice of geoscience in another state or country.

§851.152. Firm Compliance.

(a) A business entity that offers or is engaged in the practice of geoscience in Texas and is found to not be registered with the Board shall register with the Board pursuant to the requirements of §851.30 of this chapter within thirty (30) days of written notice from the Board.

(b) A business entity that offers or is engaged in the practice of geoscience in Texas and that fails to comply with subsection (a) of this section or that has previously been registered with the Board and whose registration has expired shall be considered to be in violation of Board rules and will be subject to administrative penalties as set forth in §§1002.451 - 1002.457 of the Act.

(c) The Board may revoke a certificate of registration that was obtained in violation of the Act and/or Board rules including, but not limited to, fraudulent or misleading information submitted in the application or lack of employee relationship with the designated Professional Geoscientist for the firm.

(d) A business entity that is not registered with the Board may not represent to the public by way of letters, signs, or symbols as a part of any sign, directory, listing, contract, document, pamphlet, stationery, advertisement, signature, or business name that it is engaged in the practice of geoscience by using the terms:

(1) "geoscientist,"

(2) "geoscience,"

(3) "geoscience services,"

(4) "geoscience company,"

(5) "geoscience, inc.,"

(6) "Professional Geoscientists,"

(7) "licensed geoscientists,"

(8) "registered geoscientists,"

(9) "licensed Professional Geoscientists,"

(10) "registered Professional Geoscientist," or

(11) any abbreviation or variation of those terms listed in paragraphs (1) - (10) of this subsection, or directly or indirectly use or cause to be used any of those terms in combination with other words.

(e) In addition to reporting requirements in §851.112 of this chapter, each Geoscience Firm shall notify the Board in writing no later than thirty (30) days after a change in the business entity's:

(1) Physical or mailing address, electronic mail address, telephone or facsimile number or other contact information;

(2) Officers or directors if they are the sole Professional Geoscientists of the firm;

(3) Employment status of the Professional Geoscientists of the firm;

(4) Operation including dissolution of the firm or that the firm no longer offers to provide or is not providing geoscientific services to the public in Texas; or

(5) Operation including addition or dissolution of branch and/or subsidiary offices.

(f) Notice as provided in subsection (g) of this section shall include, as applicable, the:

(1) Full legal trade or business name entity;

(2) The firm registration number;

(3) Telephone number of the business office;

(4) Name and license number of the license holder employed by or leaving the entity;

(5) Description of the change; and

(6) Effective date of this change.

(g) A Geoscience Firm shall ensure that all geoscience work is done by or under the supervision of a Professional Geoscientist.

(h) A Geoscience Firm that obtains a new certificate of authority Office of the Secretary of State or files a new Assumed Name Certificate with the County Clerk must provide the new instrument number to the Board within thirty (30) days of the action.

(i) All geoscience documents released, issued, or submitted by or for a Geoscience Firm, including preliminary documents, must clearly indicate the firm name and registration number.

(j) The Board may revoke or suspend a Geoscience Firm's registration, place on probation a firm whose registration has been suspended, reprimand a Geoscience Firm, or assess an administrative penalty against a Geoscience Firm for a violation of any provision of these rules or the Act by the firm or any employee of the firm. The Board also may take action against an Applicant pursuant to §851.110 of this chapter.

(k) Upon a finding of professional misconduct, the Board may consider but is not limited to the following factors in determining an appropriate sanction or sanctions against a Geoscience Firm:

(1) The seriousness of the conduct, including the hazard or potential hazard to the health or safety of the public;

(2) The economic damage or potential damage to property caused by the misconduct;

(3) The respondent's history concerning previous grounds for sanction;

(4) The sanction necessary to deter future misconduct;

(5) Efforts to correct the misconduct; and

(6) Any other matter justice may require.

(l) A Geoscience Firm shall maintain a work environment that uses standard operating procedures and quality assurance/quality control standards related to the Geoscience Firm's practice to ensure that the Geoscience Firm protects the health, safety, property, and welfare of the public.

§851.157. Complaints and Disciplinary Actions.

(a) A complaint may be filed with the Board by a member of the public, a member of the Board or by agency staff. Complaints against a person or entity whose activities are regulated by the Board must be made in writing, sworn to by the person making the complaint, and filed with the Secretary-Treasurer of the Board at the office of the Board in Austin. A complaint may be filed against any person who: holds a Professional Geoscientist license issued by the Board and/or is the Authorized Official of a Firm (AOF) registered by the Board, is a registered Geoscience Firm, or holds a certificate as a Geoscientist-in-Training issued by the Board. A complaint may also be filed against a person or firm that is not licensed or registered with the Board alleging that the person or firm has engaged in the unlicensed or unregistered public practice or offering of geoscientific services in Texas.

(b) A complaint must be filed within two (2) years of the event giving rise to the complaint. The event giving rise to the complaint is an event from which a concern with geoscience work completed becomes apparent. Complaints filed after the above stated period will not be accepted by the Board unless the Complainant can show good cause to the Board for the late filing.

(c) Complaints and investigations under this chapter are of two types:

(1) Complaints received from a member of the public; and

(2) Complaints and investigations that are initiated by the Board as a result of information that becomes known to the Board or agency staff and that may indicate a violation.

(d) The agency provides a complaint form which should be used to file a complaint.

(1) A complaint from a member of the public must be:

(A) In writing;

(B) Sworn to by the person making the complaint; and

(C) Filed with the Secretary-Treasurer.

(2) A complaint that is initiated by a member of the Board or agency staff must be:

(A) Made in writing; and

(B) Signed by the person who became aware of information that may indicate a violation.

(e) The Board shall maintain the confidentiality of a complaint from the time of receipt through the conclusion of the investigation of the complaint. Complaint information is not confidential after the date formal charges are filed.

(f) If a complaint is determined to be frivolous or without merit, the complaint and other information related to the complaint are confidential. The information is not subject to discovery, subpoena, or other disclosure. A complaint is considered to be frivolous if the

Executive Director and investigator, with Board approval, determine that the complaint:

(1) Was made for the likely purpose of harassment; and

(2) Does not demonstrate apparent harm to any person.

(g) Under the authority and provisions of the Texas Geoscience Practice Act (Act), the Board shall take disciplinary action against an applicant for a license, registration or certification or a license, registration, or certification holder who is found censurable for a violation of law or rules. A disciplinary action may be composed of any one or combination of the following listed in paragraphs (1) - (11) of this subsection:

(1) Refuse to issue or renew a license, registration or certification;

(2) Permanently revoke a license, registration or certification;

(3) Suspend a license, registration or certification for a specified time, not to exceed three years, to take effect immediately notwithstanding an appeal if the Board determines that the holder's continued practice constitutes an imminent danger to the public health, safety, or welfare;

(4) Issue a public or private reprimand to an applicant, a license holder, or an individual, firm, or corporation practicing geoscience or using a title authorized by the Texas Geoscience Practice Act or rules of the Board;

(5) Impose limitations, conditions, or restrictions on the practice of an applicant, a license holder, or an individual, firm, or corporation practicing geoscience using a title authorized by the Texas Geoscience Practice Act or rules of the Board;

(6) Require that a license, or certificate holder participate in a peer review program under rules adopted by the Board;

(7) Require that a license or certificate holder obtain remedial education and training prescribed by the Board;

(8) Impose probation on a license, registration or certificate holder requiring regular reporting to the Board;

(9) Require restitution, in whole or in part, of compensation or fees earned by a license holder, individual, firm, or corporation practicing geoscience under this chapter;

(10) Impose an appropriate administrative penalty as provided by Chapter 1002, Subchapter J of the Texas Geoscience Practice Act for a violation of the Act or a rule adopted by the Board on a license, registration or certificate holder or a person or firm who is not licensed and is not exempt from licensure under this chapter; or

(11) Issue a cease and desist order.

(h) All disciplinary actions shall be permanently recorded and made available upon request as public information.

(i) A license holder whose license has expired for nonpayment of renewal fees continues to be subject to all provisions of the Act and Board rules governing license holders until the license is revoked by the Board or becomes non-renewable under the Board's rules or the Act.

(j) Criminal convictions shall be handled as shown in paragraphs (1) - (3) of this subsection:

(1) The Board shall follow the requirements of Administrative Procedure Act, Texas Government Code Chapter 2001, and shall revoke the license of any license holder incarcerated as a result of a felony conviction, or violation of felony probation or parole, or revocation of mandatory supervision subsequent to being licensed as a Professional Geoscientist.

(2) The Board may take any of the actions set out in subsection (g) of this section when a license holder is convicted of a misdemeanor or a felony without incarceration if the crime directly relates to the license holder's duties and responsibilities as a Professional Geoscientist.

(3) Any license holder whose license has been revoked under the provisions of this subsection may apply for a new license upon release from incarceration.

(k) The Board, the Executive Director, an administrative law judge, and the participants in an informal conference may arrive at a greater or lesser sanction than suggested in these rules. Allegations and disciplinary actions will be set forth in the final Board Order and the severity of the disciplinary action will be based on the factors listed in paragraphs (1) - (9) of this subsection:

(1) The seriousness of the acts or omissions;

(2) The number of prior disciplinary actions taken against the respondent;

(3) The severity of penalty necessary to deter future violations;

(4) Efforts or resistance to correct the violations;

(5) Any hazard to the health, safety, property or welfare of the public;

(6) Any actual damage, physical or otherwise, caused by the violations;

(7) Any economic benefit gained through the violations;

(8) The economic harm to property or the environment caused by the violation; or

(9) Any other matters impacting justice and public welfare.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 17, 2010.

TRD-201006574
Charles Horton
Deputy Executive Director
Texas Board of Professional Geoscientists
Effective date: December 15, 2010
Proposal publication date: July 16, 2010
For further information, please call: (512) 936-4405

SUBCHAPTER E. HEARINGS--CONTESTED CASES

22 TAC §§851.201 - 851.243

The adopted new rules are authorized by the Texas Occupations Code §1002.101 which provides that the Board shall appoint an Executive Director who shall be responsible for managing the day to day affairs of the Board; §1002.151 which provides that the Board shall adopt and enforce rules consistent with the Texas

Geoscience Practice Act (the Act); §1002.154 which provides that the Board shall enforce the Act; §1002.202 which provides that a person may file a complaint alleging a violation of the Act or a rule adopted under the authority of the Act; §1002.204 which provides for complaint investigation and disposition; §§1002.401 - 1002.405 which provide for license denial and disciplinary procedures; and §§1002.451 - 1002.453 which provide the imposition of an administrative penalty against a person licensed by the Board or a person who violates the Act or a rule adopted under the authority of the Act.

The adopted new rules affect Occupations Code, Chapter 1002.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Charles Horton
Deputy Executive Director
Texas Board of Professional Geoscientists
Effective date: December 15, 2010
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For further information, please call: (512) 936-4405

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 37. MATERNAL AND INFANT HEALTH SERVICES

SUBCHAPTER R. SCHOOL HEALTH ADVISORY COMMITTEE

25 TAC §37.350

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts an amendment to §37.350, concerning the Texas School Health Advisory Committee (committee), with changes to the proposed text as published in the July 9, 2010, issue of the *Texas Register* (35 TexReg 6024).

BACKGROUND AND PURPOSE

The section complies with Health and Safety Code, §1001.0711, which requires the committee to provide assistance to the State Health Services Council (council) in establishing a leadership role for the department in the support for and delivery of coordinated school health programs and school health services. Government Code, §2110.008, which allows state agencies to designate a date on which the committee will automatically be abolished, does not apply to this committee.

The amendments are necessary to coordinate dates of terms of office for members and officers, add new members, update terminology used to describe member and officer roles, and clarify and coordinate processes for compliance with department procedures and existing program procedures.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Section 37.350 has been reviewed and the department has determined that reasons for adopting the section continue to exist because a rule on this subject is needed.

SECTION-BY-SECTION SUMMARY

Amendments for formatting, grammar and consistency in use of acronyms were made to §37.350(d)(1)(A) - (L) related to committee composition and (h)(4) related to meeting attendance by members.

An amendment was made to §37.350(d)(1) to clearly define specific members exempt from appointment by the Executive Commissioner due to statute and rule; and to add a new member to the committee composition as recommended by the council at their April 29, 2010 meeting.

New text was added to §37.350(d)(3) to describe the role and method for appointment of an alternate member, and define an alternate's term of office. This amendment allows the committee to comply with current department and committee practice, and enables the committee to fill a vacancy in advance of the standard process for appointment of new members.

An amendment was made to §37.350(e) to decrease the current term of office for a member from six years to four years in an attempt to conform to the shorter term department practice, yet still maintain the knowledge continuum among committee members.

To coincide with the accepted academic year, amendments were made to update the time frame of terms of office for officers and members in §37.350(e)(1), (f), and (f)(1).

An amendment was made to conform to current department practice within §37.350(e)(2) that describes the procedure for filling a vacant member position for the unexpired portion of the term. This amendment would enable the committee to fill a vacancy in advance of the current process for appointment of new members.

To comply with accepted committee practice, an amendment was added to §37.350(e)(3) allowing a member the option to apply for appointment as a committee member for one additional term. An additional term for members in good standing helps maintain the knowledge continuum among committee members.

Amendments were made to §37.350(f) to have the method of choosing the presiding officer conform to that specified in Government Code, §2110.003.

Amendments were made to §37.350(f)(3) and (h)(2) to combine or delete words and/or phrases with the same meaning or outcome to eliminate redundancy concerning officers and attendance.

An amendment was made to §37.350(f)(3) to allow for the assistant presiding officer to complete the role of presiding officer in the event of the presiding officer's vacancy before the end of the term and be installed as presiding officer following the presiding officer's final term of office in order to provide leadership continuity for the position. Transitioning a qualified assistant presiding officer into the role of presiding officer is a widely used practice.

An amendment was made to §37.350(h)(2) to eliminate subjectivity in the grounds for removal of a member by eliminating the

specific reasons for "grounds for removal of a member" leaving just the number of absences necessary for dismissal. There are many reasons a member may not be able to complete a term and consideration should be given on a case by case basis. Section 37.350(h)(2) also would allow a member out of compliance with committee attendance rules who wishes to remain on the committee to provide reasonable explanation for non-compliance.

To align with current department practice, a change in §37.350(h)(3) was added to replace a current member removed from the committee with a previously approved applicant without the need for additional recommendation by the commission. This is the same action taken for officers and alternates in the same situations in current rules. The amendment would allow a vacancy to be filled in advance of the current process for appointment of new members. This action will also allow the amendment to align with changes in §37.350(e)(2) concerning the vacancy of a member.

To align with current committee practice and comply with Roberts Rules of Order, an amendment was made to §37.350(j)(1) to add an additional committee voting process. This process is in current use by the committee.

An amendment was made to §37.350(j)(3) to add an exemption to the existing paragraph stating a committee member may not authorize another individual to represent that member by proxy. A change in the exemption will add additional member representatives appointed by the commissioner of the department and a new member representing the Governor's Advisory Council on Physical Fitness (GACPF). This also changes the number of agencies represented from two to four as mentioned in the previous categorically required membership representation where flexibility allows the designation of another agency representative as an alternate.

Amendments were made to §37.350(j)(5)(B) describing the process for dissemination of committee minutes to include naming groups that receive minutes and setting a deadline for providing minutes to members. The changes save time by shortening the dissemination pathway. Changing this amendment would also align it with current committee practice.

To change the order of subparagraphs, amendments were made to §37.350(j)(5)(A) and (B) to reflect correct chronological order concerning approval and distribution of minutes.

To clarify the committee's role in statutes (Education Code, §38.013, and Health and Safety Code, §1001.0711), an amendment was made to §37.350(l)(2) which require the committee to make recommendations relative to school health issues. Because, by law, the committee is charged to make recommendations or provide advice, it became necessary to add a clarifying statement about the committee's role in relation to legislative activity.

As detailed in §37.350(n)(4), an amendment was made to limit reimbursable expenses for eligible categories of members. Department practice allows program staff to determine types of reimbursable expenses for committee members as long as the member is informed in writing by letter or email. This amendment would allow staff to determine, as needed, allowable expenses for reimbursement to eligible members. The amendment will help address budget issues.

COMMENTS

The department, on behalf of the commission, did not receive any public comments concerning the proposal during the comment period.

Revisions have been made to further clarify the intent of the rule with minor changes to maintain consistency.

Concerning §37.350(h)(3), the phrase "be recommended to" was deleted because the rule did not propose the same action as it does for officers and alternates in subsections (d)(3), (e)(2), and (f)(3) to serve out the remaining portion of a term if vacated by another member.

Concerning §37.350(j)(3), exceptions in the representation by proxy of certain members, a department representative and a new GACPF representative were added in this paragraph to align the rule text with the member composition in subsection (d)(1).

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The amendment is adopted under the Health and Safety Code, §1001.0711, which requires a rule to establish a committee to provide assistance to the State Health Services Council in establishing a leadership role for the department in the support for and delivery of coordinated school health programs and school health services; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rule implements Government Code, §2001.039.

§37.350. School Health Advisory Committee.

(a) The committee. The School Health Advisory Committee (committee) shall be appointed under and governed by this section. The committee is established under the Health and Safety Code, §11.016, which allows the Health and Human Services Commission (commission) to establish advisory committees.

(b) Applicable law. Government Code, §2110.008, does not apply to a committee created under this section. The committee is subject to the Health and Safety Code, §1001.0711, concerning the School Health Advisory Committee.

(c) Purpose. The purpose of the committee is to provide assistance to the State Health Services Council (council) in establishing a leadership role for the Department of State Health Services (department) in support for and delivery of coordinated school health programs and school health services.

(d) Composition.

(1) The committee shall be composed of one representative from the Texas Department of Agriculture (TDA), appointed by the Commissioner of Agriculture; one representative from the Texas Education Agency (TEA), appointed by the Commissioner of Education; the department's School Health Program Coordinator or other department representative; one representative from the Governor's Advisory Council on Physical Fitness (GACPF), to be designated by the GACPF; and 17 members appointed by the Executive Commissioner of the Health and Human Services Commission which shall consist of:

(A) two individuals representing school superintendents or other school administrators; and/or school district board members;

(B) one registered nurse with school district or school health administrative nursing experience;

(C) five consumer members who are parents of school-age children with at least one parent of a child with special needs;

(D) one physician, or physician's assistant, or nurse practitioner providing health services to school-aged children;

(E) one representative working in the school setting with certification in student counseling and guidance and/or safety;

(F) four members representing organizations and/or agencies involved with the health of school children;

(G) one representative working in the school setting with certification as a physical educator;

(H) one representative working in the school setting with certification as a health educator; and

(I) one representative working in the school setting as part of the district's school nutrition services.

(2) During all phases of the membership selection process, the following information will be regarded with special consideration in an effort to build a committee reflective of the current Texas population: race, gender, age and ethnic diversity; urban, rural and suburban diversity; and, a broad statewide geographic representation whenever possible.

(3) Membership shall include one alternate member for each category representing a component of comprehensive school health. The alternate will automatically be appointed as a member if the designated appointee is unable or unwilling to fulfill that role; or, whenever there is a vacancy in a membership category before the end of a member's term. The appointed alternate will take the place of the member only during the term of office when the vacancy occurred. The appointed alternate will perform the same duties and have the same privileges as the appointed member.

(e) Terms of office. The term of office of each member shall be four years. Members shall serve after expiration of their term until a replacement is appointed.

(1) Members shall be appointed for staggered terms so that the terms of a substantially equivalent number of members will expire on July 31 of each year.

(2) If a vacancy occurs before the expiration of a member's term, the most currently appointed alternate for the category where the vacancy has occurred may assume the unexpired portion of that term.

(3) A member whose term is expiring has the option to apply for appointment for one additional term.

(f) Officers. The committee members shall elect a presiding officer and an assistant presiding officer to begin serving on August 1 of their term.

(1) Each officer shall serve until July 31 of their term. Each officer may hold over until the committee members elect his or her replacement.

(2) The presiding officer shall preside at all committee meetings at which he or she is in attendance, call meetings in accordance with this section, appoint subcommittees of the committee as necessary, and cause proper reports to be made to the Executive Commissioner of the Health and Human Services Commission. The presiding officer may serve as an ex-officio member of any subcommittee of the committee.

(3) The assistant presiding officer shall act for the presiding officer during his/her absence and shall assume the office of presiding officer in the event of a vacancy. When the unexpired term of the presiding officer is less than one-half, the assistant presiding officer shall complete the unexpired term of the presiding officer and the presiding officer will be installed to begin serving a two-year term as presiding officer with all the duties and privileges of the presiding officer as described in paragraph (2) of this subsection.

(4) If the office of assistant presiding officer becomes vacant, it may be filled temporarily by vote of the committee until the Executive Commissioner of the Health and Human Services Commission appoints a successor.

(5) A member shall serve no more than two consecutive terms as presiding officer and/or assistant presiding officer.

(6) The committee may reference its officers by other terms, such as chairperson and vice-chairperson.

(g) Meetings. The committee shall meet at least twice each year.

(1) A meeting may be called by agreement of the department staff and either the presiding officer or at least three members of the committee.

(2) The department shall make meeting arrangements and shall contact committee members to determine availability for a meeting date and place.

(3) The committee is not a "governmental body" as defined in the Open Meetings Act, Government Code, Chapter 551. However, in order to promote public participation, each meeting of the committee shall be announced and conducted in accordance with the Open Meetings Act, Government Code, Chapter 551, with the exception that the provisions allowing executive sessions shall not apply.

(4) Each member of the committee shall be informed of a committee meeting at least five working days before the meeting.

(5) Ten members of the committee shall constitute a quorum for the purpose of transacting official business.

(6) The committee is authorized to transact official business only when in a legally constituted meeting with a quorum present.

(7) The agenda for each committee meeting shall include an item entitled public comment under which any person will be allowed to address the committee on matters relating to committee business. The presiding officer may establish procedures for public comment, including a time limit on each comment.

(h) Attendance. Members shall attend committee meetings as scheduled. Members shall attend meetings of subcommittees to which the member is assigned.

(1) A member shall notify the presiding officer or appropriate department staff if he or she is unable to attend a scheduled meeting.

(2) It is grounds for removal from the committee if a member cannot discharge the member's duties for a substantial part of the term, is absent for more than half of the committee and subcommittee meetings during a calendar year, or is absent from at least three consecutive committee meetings. If the absences are determined to be reasonable, the member shall remain on the committee.

(3) If a member is removed from the committee before the end of his/her term, the alternate appointee for the representative category will serve out the remaining portion of the term.

(4) The validity of an action of the committee is not affected by the fact that it is taken when grounds for removal of a member exist.

(i) Staff. The department shall provide administrative support for the committee.

(j) Procedures. Roberts Rules of Order, Newly Revised, shall be the basis of parliamentary decisions except where otherwise provided by law or rule.

(1) Any committee action must be approved with a quorum present and by a majority vote or consensus of the members present.

(2) Each member shall have one vote.

(3) A member may not authorize another individual to represent the member by proxy with the exception of the TDA, TEA and department representatives appointed by the commissioners of these agencies, and the GACPF representative designated by the GACPF. The commissioners of these agencies and the GACPF may appoint alternates to attend and vote.

(4) The committee shall make decisions in the discharge of its duties without discrimination based on any person's race, creed, gender, religion, national origin, age, physical condition, or economic status.

(5) Minutes of each committee meeting shall be taken by the department staff.

(A) After approval by the committee, the minutes shall be signed by the presiding officer.

(B) A copy of the minutes approved by the committee and signed by the presiding officer shall be provided to the council within 30 days of each meeting. Committee members will receive minutes of each meeting at least five days prior to the following meeting.

(k) Subcommittees. The committee may establish subcommittees as necessary to assist the committee in carrying out its duties.

(1) The presiding officer shall appoint members of the committee to serve on subcommittees and to act as subcommittee chairpersons. The presiding officer may also appoint nonmembers of the committee to serve on subcommittees.

(2) Subcommittees shall meet when called by the subcommittee chairperson or when so directed by the committee.

(3) A subcommittee chairperson shall make regular reports to the committee at each of its meetings or in interim written reports as needed. The reports shall include an executive summary or minutes of each subcommittee meeting.

(l) Statement by members.

(1) The commission, the council, the department, and the committee shall not be bound in any way by any statement or action on the part of any committee member except when a statement or action is in pursuit of specific instructions from the commission, council, department, or committee.

(2) The committee and its members may not participate in legislative activity in the name of the commission, the council, the department or the committee except with approval through the department's legislative process. Committee members are not prohibited from representing themselves or other entities in the legislative process. The committee will make recommendations per statutory requirements.

(m) Reports to council. The committee shall file an annual written report to the council.

(1) The report shall list the meeting dates of the committee and any subcommittees, the attendance records of its members, a brief description of actions taken by the committee, a description of how the committee has accomplished the tasks given to the committee by the council, the status of any rules which were recommended by the committee to the council and anticipated activities of the committee for the next year.

(2) The report shall identify the costs related to the committee's existence, including the cost of agency staff time spent in support of the committee's activities.

(3) The report shall cover the meetings and activities in the immediate preceding 12 months and shall be filed with the council each June. The presiding officer and appropriate department staff shall sign it.

(n) Reimbursement for expenses. In accordance with the requirements set forth in the Government Code, Chapter 2110, a committee member may receive reimbursement for the member's expenses incurred for each day the member engages in official committee business if authorized by the General Appropriations Act or budget execution process.

(1) No compensatory per diem shall be paid to members unless required by law.

(2) A committee member who is an employee of a state agency, other than the department, may not receive reimbursement for expenses from the department.

(3) A nonmember of the committee who is appointed to serve on a subcommittee may not receive reimbursement for expenses from the department.

(4) Each member who is eligible to be reimbursed for expenses shall submit to staff the member's receipts for allowable expenses as determined by school health program staff, and any required official forms not later than 14 days after each committee meeting.

(5) Requests for reimbursement of expenses shall be made on official state vouchers prepared by department staff.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 19, 2010.

TRD-201006645
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: December 9, 2010
Proposal publication date: July 9, 2010
For further information, please call: (512) 458-7111 x6972

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CHAPTER 133. HOSPITAL LICENSING

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts amendments to §§133.2, 133.41, and 133.163 and new §133.49, concerning the regulation of general hospitals. The amendments to §133.2

and §133.41 are adopted with changes to the proposed text as published in the July 2, 2010, issue of the *Texas Register* (35 TexReg 5701). Sections 133.49 and 133.163 are adopted without changes and, therefore, the sections will not be republished.

BACKGROUND AND PURPOSE

The amendments and new section are necessary to comply with legislation passed during the 81st Legislature, 2009, Regular Session.

House Bill (HB) 643 added Health and Safety Code, Chapter 259, which requires hospitals to comply with qualification standards for employment of surgical technologists.

HB 2626 amended Health and Safety Code, Chapter 323, which requires hospitals to provide forensic medical examinations for certain sexual assault victims.

Senate Bill (SB) 1932 amended Health and Safety Code, Chapter 251, which allows hospitals to provide outpatient dialysis during declared disasters.

SB 476 added Health and Safety Code, Chapter 257, relating to nurse staffing, and Chapter 258, relating to mandatory overtime for nurses prohibited.

SB 203 amended Health and Safety Code, Chapter 98, involving the reporting of healthcare-associated infections and preventable adverse events in certain health care facilities to the department.

The department regulates general hospitals as required by Health and Safety Code, Chapter 241.

SECTION-BY-SECTION SUMMARY

Amendments to §133.2 add definitions for nurse and surgical technologist.

An amendment to §133.41(e) requires hospitals to provide, with documented consent, care to a sexual assault victim age 18 years or older who has not reported the assault to a law enforcement agency, if the victim has arrived at the hospital not later than 96 hours after the time the assault occurred.

An amendment to §133.41(g) requires hospitals to require a written, implemented, and enforced policy for reporting to the department certain healthcare-associated infections and preventable adverse events.

Amendments to §133.41(f) and (o) require the governing body of a hospital to adopt, implement, and enforce a written nurse staffing policy; require hospitals to create a nurse staffing committee; establish committee membership; require the committee to meet at least quarterly; define responsibilities of the committee; require a nurse services staffing plan and policies; require annual reporting to the department on the nurse staffing policy, nurse staffing plan, nurse staffing committee, and nurse sensitive outcome measures used in the nurse staffing plan; require the adoption, implementation and enforcement of policies on use of mandatory overtime; prohibit hospitals from requiring a nurse to work mandatory overtime or using on-call time as a substitute for mandatory overtime; provide exceptions to the mandatory overtime prohibition in certain situations, including disasters or emergencies, and require the hospital to make and document a good faith effort to meet staffing needs through other measures; and require that a hospital may not suspend, terminate, discipline, or discriminate against a nurse who refuses to work mandatory overtime.

An amendment to §133.41(t) allows hospitals to provide outpatient dialysis services when the Governor or the President of the United States declares a disaster in this state or another state.

An amendment to §133.41(w) requires hospitals that employ surgical technologists to adopt, implement, and enforce policies related to the employment of surgical technologists. The new §133.49 requires hospitals to comply with reporting certain health care-associated infections and preventable adverse events to the department in accordance with Health and Safety Code, §§98.103, 98.104, and 98.1045 (relating to Reportable Infections, Alternative for Reportable Surgical Site Infections, and Reporting of Preventable Adverse Events). The department will promulgate rules to set forth the detailed requirements for reporting. This information will allow the department to make available patient safety information in Texas, including information related to healthcare-associated infections and preventable adverse events in a format that will be available on the Internet.

An amendment to §133.163 establishes that outpatient renal dialysis shall not be performed in a hospital's inpatient renal dialysis suite unless authorized during a disaster declaration, as referenced in §133.41.

COMMENTS

The department, on behalf of the commission, has reviewed and prepared responses to the comments received regarding the proposed rules during the comment period, which the commission has reviewed and accepts. The commenters were individuals, associations, and/or groups, including the following: Texas Board of Nursing, Texas Hospital Association, Texas Nursing Association, Texas Association Against Sexual Assault, and the Texas Association of Rural and Community Hospitals. The commenters were not against the rules in their entirety; however, the commenters suggested recommendations for change as discussed in the summary of comments.

Comment: Concerning the definition of "nurse" in §133.2(31), two commenters requested amending the definition to include advanced practice registered nurses and nurses practicing in Texas holding a multi-state licensure privilege.

Response: The commission agrees and added the words, "advanced practice registered nurse licensed by the Texas Board of Nursing or entitled to practice in this state," with a reference to Occupations Code, Chapters 304 and 305.

Comment: Concerning the definition of "Registered nurse (RN)" in §133.2(46), one commenter requested an update to reference the "Board of Nursing."

Response: The commission agrees, and replaced the agency name "Board of Nurse Examiners" with the "Texas Board of Nursing."

Comment: Concerning §133.41(e)(6)(B), one commenter supported the rules as proposed, particularly that only sexual assault victims age 18 or older are eligible to undergo a forensic medical examination without a report to law enforcement.

Response: The department acknowledges receipt of this comment. No change was made to the rule as a result of this comment.

Comment: Concerning §133.41(o)(2)(E), two commenters requested adding a requirement from the Board of Nursing Rule, 22 Texas Administrative Code, §217.11, concerning nurses accepting assignments.

Response: The commission disagrees, as this addresses individual nurse practice and is not under the jurisdiction of the department. A requirement was added to §133.41(f)(8)(C) for the governing body of a facility to adopt, implement, and enforce a policy related to nursing assignments, to "ensure that all nursing assignments consider client safety and are commensurate with the nurse's educational preparation, experience, knowledge, and physical and emotional ability."

Comment: Concerning §133.41(o)(2)(G), two commenters requested that the nurse staffing plan address "time off for nurses who have worked extended hours within a certain period of time at that facility."

Response: The commission disagrees with adding this requirement. Members of the nurse staffing committee are selected by their peers, and at least 60% of the committee is composed of registered nurses involved in direct patient care. This selection of committee members ensures that the nurses' scheduling needs are met and that nurses have an active voice in the scheduling process. A requirement was added to §133.41(f)(8)(C) for the governing body of a facility to adopt, implement, and enforce a policy related to "ensure that all nursing assignments consider client safety and are commensurate with the nurse's educational preparation, experience, knowledge, and physical and emotional ability."

Comment: Concerning on-call time for nurses, two commenters requested the nurse staffing plan address how on-call time will be used at the facility.

Response: The commission agrees, and has added the phrase "include how on-call time will be used" to §133.41(o)(2)(G)(ii)(IV).

Comment: Concerning §133.41(o)(3)(A)(ii), mandatory overtime for nurses, two commenters requested amending the definition of mandatory overtime to include the words, "for the purposes of determining mandatory overtime, work time includes hospital-required attendance at in-service, continuing education, and meetings." The commenters stated that adding this language would be consistent with federal law.

Response: The commission disagrees, as the addition is not required. Section 133.1(c) states that "compliance with this chapter does not constitute release from the requirements of other applicable federal, state, or local laws, codes, rules, regulations and ordinances." No change was made to the rule as a result of this comment.

Comment: Concerning §133.41(o)(3)(E)(iv), two commenters requested replacing the words, "scheduling nurses for procedures that could be anticipated to require the nurse to stay beyond the end of their scheduled shift constitutes mandatory overtime and shall be prohibited," with "adding elective procedures to the established schedule that require the nurse to stay involuntarily beyond the end of the nurse's scheduled shift constitutes prohibited mandatory overtime."

Response: The commission disagrees with adding the suggested sentence, but agrees that a change is needed. The commission has replaced the statement, "scheduling nurses for procedures that could be anticipated to require the nurse to stay beyond the end of their scheduled shift constitutes mandatory overtime and shall be prohibited" with the statement, "the nurse staffing committee shall ensure that scheduling a nurse for a procedure that could be anticipated to require the nurse to stay beyond the end of his or her scheduled shift does not constitute mandatory overtime." This statement requires each hospital, through the nurses and other staff on the nurse staffing committee, to address the issue of scheduling nurses for procedures and mandatory overtime.

Comment: Concerning §133.41(o), two commenters requested the addition of a new subparagraph with the words, "Work time being permitted mandatory overtime under this paragraph (3) does not relieve nurses of their duty not to accept assignments not commensurate with the nurse's physical and emotional ability; e.g., because overly fatigued."

Response: The commission disagrees, as this addresses individual nurse practice and is not under the jurisdiction of the department. No change was made to the rule as a result of this comment.

Comment: Concerning §133.41(o)(3), one commenter stated the definition of "mandatory overtime" is problematic and recommended removal of the term "scheduled" from the definition. The commenter supported the prohibition of on-call shifts substituting for mandatory overtime.

Response: The commission disagrees with removing the term "scheduled" from the definition of mandatory overtime, as the definition was derived from the statute. The department acknowledges receipt of the comment related to on-call shifts, which was derived from the statute. No change was made to the rule as a result of this comment.

Comment: Concerning §133.41(o)(3) related to mandatory overtime for nurses, one commenter supported language in the rules about scheduling nurses for procedures beyond staffing levels in specific work environments.

Response: The commission acknowledges receipt of this comment. No change was made to the rule as a result of this comment.

Comment: Concerning §133.41(w), two commenters requested the addition of the words "employ surgical technologists" to require only hospitals employing surgical technologists to adopt, implement and enforce policies to comply with Health and Safety Code, Chapter 250 (relating to Surgical Technologists at Health Care Facilities).

Response: The commission agrees, and has added the phrase, "If the facility employs surgical technologists" to §133.41(w)(1)(E).

The following changes were included that will provide clarification.

The rule text in §133.41(e)(6)(B)(i) was revised as "a forensic medical examination in accordance with Government Code, Chapter 420, Subchapter B, when the examination has been requested by a law enforcement agency under Code of Criminal Procedure, Article 56.06, or is conducted under Code of Criminal Procedure, Article 56.065. If a sexual assault survivor is age 18 or older and has not reported the assault to a law enforcement agency, a hospital shall provide this forensic medical examination when the sexual assault survivor has arrived at the facility not later than 96 hours after the time the assault occurred and has consented to the examination" for clarity, which required renumbering subparagraph (B).

Concerning §133.41(o)(3)(A)(ii), in the definition of mandatory overtime, the last sentence, "In determining whether work is mandatory overtime, prescheduled on-call time or time immediately before or after a scheduled shift necessary to document

or communicate patient status to ensure patient safety is not included." was replaced with the sentence, "Mandatory overtime does not include prescheduled on-call time or time immediately before or after a scheduled shift necessary to document or communicate patient status to ensure patient safety." for clarity.

The amount of <1 mg/L was revised to <0.1 mg/L to reflect the correct amount of total chlorine in §133.41(t)(4)(B)(viii)(III)(-g-).

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

SUBCHAPTER A. GENERAL PROVISIONS

25 TAC §133.2

STATUTORY AUTHORITY

The amendment is authorized by Health and Safety Code, §241.026, concerning rules and minimum standards for the licensing and regulation of general hospitals; Health and Safety Code, Chapter 98, concerning the reporting the of health-care-associated infections; Health and Safety Code, Chapter 257, relating to nurse staffing, and Chapter 258, relating to mandatory overtime for nurses prohibited; Health and Safety Code, Chapter 259, concerning the surgical technologists at health care facilities; Health and Safety Code, Chapter 323, which requires hospitals to provide forensic medical examinations for certain sexual assault victims; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

§133.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Act--The Texas Hospital Licensing Law, Health and Safety Code, Chapter 241.

(2) Action plan--A written document that includes specific measures to correct identified problems or areas of concern; identifies strategies for implementing system improvements; and includes outcome measures to indicate the effectiveness of system improvements in reducing, controlling or eliminating identified problem areas.

(3) Advanced practice nurse (APN)--A registered nurse who is currently licensed and authorized by the Board of Nurse Examiners for the State of Texas to practice as a nurse practitioner, nurse-midwife, nurse anesthetist, or clinical nurse specialist.

(4) Adverse event--An event that results in unintended harm to the patient by an act of commission or omission rather than by the underlying disease or condition of the patient.

(5) Applicant--The person legally responsible for the operation of the hospital, whether by lease or ownership, who seeks a hospital license from the department.

(6) Available--When referring to on-site personnel, on the premises and able to rapidly perform hands-on care in an emergency situation.

(7) Chemical dependency services--A planned, structured, and organized program designed to initiate and promote a person's chemical-free status or to maintain the person free of illegal drugs. It includes, but is not limited to, the application of planned procedures to identify and change patterns of behavior related to or resulting from chemical dependency that are maladaptive, destructive, or injurious to health, or to restore appropriate levels of physical, psychological, or social functioning lost due to chemical dependency.

(8) Community-wide plan--An agreement entered into between one or more health care facilities, entities administering a sexual assault program, district attorney's offices, or law enforcement agencies that designates one or more health care facilities in the community as a primary health care facility to furnish emergency medical services and evidence collection to sexual assault survivors on a community or area-wide basis.

(9) Comprehensive medical rehabilitation--The provision of rehabilitation services that are designed to improve or minimize a person's physical or cognitive disabilities, maximize a person's functional ability, or restore a person's lost functional capacity through close coordination of services, communication, interaction, and integration among several professions that share responsibility to achieve team treatment goals for the person.

(10) Comprehensive medical rehabilitation hospital--A general hospital that specializes in providing comprehensive medical rehabilitation services, including surgery and related ancillary services.

(11) Comprehensive medical rehabilitation unit--An identifiable part of a hospital which provides comprehensive medical rehabilitation services to patients admitted to the unit.

(12) Cooperative agreement--An agreement among two or more hospitals for the allocation or sharing of health care equipment, facilities, personnel, or services.

(13) Dentist--A person licensed to practice dentistry by the Texas State Board of Dental Examiners. This includes a doctor of dental surgery or a doctor of dental medicine.

(14) Department--The Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756-3199.

(15) Dietitian--A person who is currently licensed by the Texas State Board of Examiners of Dietitians as a licensed dietitian or provisional licensed dietitian, or who is a registered dietitian with the American Dietetic Association.

(16) Director--The hospital licensing director, Department of State Health Services.

(17) Emergency medical condition--A medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain, psychiatric disturbances or symptoms of substance abuse) such that the absence of immediate medical attention could reasonably be expected to result in one or all of the following:

(A) placing the health of the individual (or with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy;

(B) serious impairment to bodily functions;

(C) serious dysfunction of any bodily organ or part; or

(D) with respect to a pregnant woman who is having contractions:

(i) that there is inadequate time to effect a safe transfer to another hospital before delivery; or

(ii) that transfer may pose a threat to the health or safety of the woman or the unborn child.

(18) General hospital--An establishment that:

(A) offers services, facilities, and beds for use for more than 24 hours for two or more unrelated individuals requiring diagnosis, treatment, or care for illness, injury, deformity, abnormality, or pregnancy; and

(B) regularly maintains, at a minimum, clinical laboratory services, diagnostic X-ray services, treatment facilities including surgery or obstetrical care or both, and other definitive medical or surgical treatment of similar extent.

(19) Governing body--The governing authority of a hospital which is responsible for a hospital's organization, management, control, and operation, including appointment of the medical staff; includes the owner or partners for hospitals owned or operated by an individual or partners.

(20) Governmental unit--A political subdivision of the state, including a hospital district, county, or municipality, and any department, division, board, or other agency of a political subdivision.

(21) Hospital--A general hospital or a special hospital.

(22) Hospital administration--Administrative body of a hospital headed by an individual who has the authority to represent the hospital and who is responsible for the operation of the hospital according to the policies and procedures of the hospital's governing body.

(23) Inpatient--An individual admitted for an intended length of stay of 24 hours or greater.

(24) Inpatient services--Services provided to an individual admitted to a hospital for an intended length of stay of 24 hours or greater.

(25) Licensed vocational nurse (LVN)--A person who is currently licensed under the Nursing Practice Act by the Board of Nurse Examiners for the State of Texas as a licensed vocational nurse or who holds a valid vocational nursing license with multi-state licensure privilege from another compact state.

(26) Licensee--The person or governmental unit named in the application for issuance of a hospital license.

(27) Medical staff--A physician or group of physicians and a podiatrist or group of podiatrists who by action of the governing body of a hospital are privileged to work in and use the facilities of a hospital for or in connection with the observation, care, diagnosis, or treatment of an individual who is, or may be, suffering from a mental or physical disease or disorder or a physical deformity or injury.

(28) Mental health services--All services concerned with research, prevention, and detection of mental disorders and disabilities and all services necessary to treat, care for, supervise, and rehabilitate persons who have a mental disorder or disability, including persons whose mental disorders or disabilities result from alcoholism or drug addiction.

(29) Mental retardation--Significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period.

(30) Niche hospital--A hospital that:

(A) classifies at least two-thirds of the hospital's Medicare patients or, if data is available, all patients:

(i) in not more than two major diagnosis-related groups; or

(ii) in surgical diagnosis-related groups;

(B) specializes in one or more of the following areas:

(i) cardiac;

(ii) orthopedics;

(iii) surgery; or

(iv) women's health; and

(C) is not:

(i) a public hospital;

(ii) a hospital for which the majority of inpatient claims are for major diagnosis-related groups relating to rehabilitation, psychiatry, alcohol and drug treatment, or children or newborns; or

(iii) a hospital with fewer than 10 claims per bed per year.

(31) Nurse--A registered, vocational, or advanced practice registered nurse licensed by the Texas Board of Nursing or entitled to practice in this state under Occupations Code, Chapters 301, 304, or 305.

(32) Outpatient--An individual who presents for diagnostic or treatment services for an intended length of stay of less than 24 hours; provided, however, that an individual who requires continued observation may be considered as an outpatient for a period of time not to exceed a total of 48 hours.

(33) Outpatient services--Services provided to patients whose medical needs can be met in less than 24 hours and are provided within the hospital; provided, however, that services that require continued observation may be considered as outpatient services for a period of time not to exceed a total of 48 hours.

(34) Owner--One of the following persons or governmental unit which will hold or does hold a license issued under the statute in the person's name or the person's assumed name:

(A) a corporation;

(B) a governmental unit;

(C) a limited liability company;

(D) an individual;

(E) a partnership if a partnership name is stated in a written partnership agreement or an assumed name certificate;

(F) all partners in a partnership if a partnership name is not stated in a written partnership agreement or an assumed name certificate; or

(G) all co-owners under any other business arrangement.

(35) Patient--An individual who presents for diagnosis or treatment.

(36) Pediatric and adolescent hospital--A general hospital that specializes in providing services to children and adolescents, including surgery and related ancillary services.

(37) Person--An individual, firm, partnership, corporation, association, or joint stock company, and includes a receiver, trustee, assignee, or other similar representative of those entities.

(38) Physician--A physician licensed by the Texas Medical Board.

(39) Physician assistant--A person licensed as a physician assistant by the Texas State Board of Physician Assistant Examiners.

(40) Podiatrist--A podiatrist licensed by the Texas State Board of Podiatric Medical Examiners.

(41) Practitioner--A health care professional licensed in the State of Texas, other than a physician, podiatrist, or dentist. A practitioner shall practice in a manner consistent with their underlying practice act.

(42) Premises--A premises may be any of the following:

(A) a single building where inpatients receive hospital services; or

(B) multiple buildings where inpatients receive hospital services provided that the following criteria are met:

(i) all buildings in which inpatients receive hospital services are subject to the control and direction of the same governing body;

(ii) all buildings in which inpatients receive hospital services are within a 30-mile radius of the primary hospital location;

(iii) there is integration of the organized medical staff of each of the hospital locations to be included under the single license;

(iv) there is a single chief executive officer for all of the hospital locations included under the license who reports directly to the governing body and through whom all administrative authority flows and who exercises control and surveillance over all administrative activities of the hospital;

(v) there is a single chief medical officer for all of the hospital locations under the license who reports directly to the governing body and who is responsible for all medical staff activities of the hospital;

(vi) each hospital location to be included under the license that is geographically separate from the other hospital locations contains at least one nursing unit for inpatients which is staffed and maintains an active inpatient census, unless providing only diagnostic or laboratory services, or a combination of diagnostic or laboratory services, in the building for hospital inpatients; and

(vii) each hospital that is to be included in the license complies with the emergency services standards:

(I) for a general hospital, if the hospital provides surgery or obstetrical care or both; or

(II) for a special hospital, if the hospital does not provide surgery or obstetrical care.

(43) Presurvey conference--A conference held with department staff and the applicant or the applicant's representative to review licensure rules and survey documents and provide consultation prior to the on-site licensure inspection.

(44) Psychiatric disorder--A clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is typically associated with either a painful syndrome (distress) or impairment in one or more important areas of behavioral, psychological, or biological function and is more than a disturbance in the relationship between the individual and society.

(45) Quality improvement--A method of evaluating and improving processes of patient care which emphasizes a multidisciplinary approach to problem solving, and focuses not on individuals, but systems of patient care which might be the cause of variations.

(46) Registered nurse (RN)--A person who is currently licensed by the Texas Board of Nursing for the State of Texas as a registered nurse or who holds a valid registered nursing license with multistate licensure privilege from another compact state.

(47) Special hospital--An establishment that:

(A) offers services, facilities, and beds for use for more than 24 hours for two or more unrelated individuals who are regularly admitted, treated, and discharged and who require services more intensive than room, board, personal services, and general nursing care;

(B) has clinical laboratory facilities, diagnostic X-ray facilities, treatment facilities, or other definitive medical treatment;

(C) has a medical staff in regular attendance; and

(D) maintains records of the clinical work performed for each patient.

(48) Stabilize--With respect to an emergency medical condition, to provide such medical treatment of the condition necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility, or that the woman has delivered the child and the placenta.

(49) Surgical technologist--A person who practices surgical technology as defined in Health and Safety Code, Chapter 259.

(50) Transfer--The movement (including the discharge) of an individual outside a hospital's facilities at the direction of any person employed by (or affiliated or associated, directly or indirectly, with) the hospital, but does not include such a movement of an individual who has been declared dead, or leaves the facility without the permission of any such person.

(51) Universal precautions--Procedures for disinfection and sterilization of reusable medical devices and the appropriate use of infection control, including hand washing, the use of protective barriers, and the use and disposal of needles and other sharp instruments as those procedures are defined by the Centers for Disease Control and Prevention (CDC) of the Department of Health and Human Services. This term includes standard precautions as defined by CDC which are designed to reduce the risk of transmission of blood borne and other pathogens in hospitals.

(52) Violation--Failure to comply with the licensing statute, a rule or standard, special license provision, or an order issued by the commissioner of state health services (commissioner) or the commissioner's designee, adopted or enforced under the licensing statute. Each day a violation continues or occurs is a separate violation for purposes of imposing a penalty.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 19, 2010.

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Lisa Hernandez
General Counsel
Department of State Health Services
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For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER C. OPERATIONAL REQUIREMENTS

25 TAC §133.41, §133.49

STATUTORY AUTHORITY

The amendment and new section are authorized by Health and Safety Code, §241.026, concerning rules and minimum standards for the licensing and regulation of general hospitals; Health and Safety Code, Chapter 98, concerning the reporting the of healthcare-associated infections; Health and Safety Code, Chapter 257, relating to nurse staffing, and Chapter 258, relating to mandatory overtime for nurses prohibited; Health and Safety Code, Chapter 259, concerning the surgical technologists at health care facilities; Health and Safety Code, Chapter 323, which requires hospitals to provide forensic medical examinations for certain sexual assault victims; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

§133.41. Hospital Functions and Services.

(a) Anesthesia services. If the hospital furnishes anesthesia services, these services shall be provided in a well-organized manner under the direction of a qualified physician in accordance with the Medical Practice Act and the Nursing Practice Act. The hospital is responsible for and shall document all anesthesia services administered in the hospital.

(1) Organization and staffing. The organization of anesthesia services shall be appropriate to the scope of the services offered. Only personnel who have been approved by the facility to provide anesthesia services shall administer anesthesia. All approvals or delegations of anesthesia services as authorized by law shall be documented and include the training, experience, and qualifications of the person who provided the service.

(2) Delivery of services. Anesthesia services shall be consistent with needs and resources. Policies on anesthesia procedure shall include the delineation of pre-anesthesia and post-anesthesia responsibilities. The policies shall ensure that the following are provided for each patient.

(A) A pre-anesthesia evaluation by an individual qualified to administer anesthesia under paragraph (1) of this subsection shall be performed within 48 hours prior to surgery.

(B) An intraoperative anesthesia record shall be provided. The record shall include any complications or problems occurring during the anesthesia including time, description of symptoms, review of affected systems, and treatments rendered. The record shall correlate with the controlled substance administration record.

(C) A post-anesthesia follow-up report shall be written by the person administering the anesthesia before transferring the patient from the post-anesthesia care unit and shall include evaluation for recovery from anesthesia, level of activity, respiration, blood pressure, level of consciousness, and patient's oxygen saturation level.

(i) With respect to inpatients, a post-anesthesia evaluation for proper anesthesia recovery shall be performed after transfer from the post-anesthesia care unit and within 48 hours after surgery by the person administering the anesthesia, registered nurse (RN), or physician in accordance with policies and procedures approved by the medical staff and using criteria written in the medical staff bylaws for postoperative monitoring of anesthesia.

(ii) With respect to outpatients, immediately prior to discharge, a post-anesthesia evaluation for proper anesthesia recovery shall be performed by the person administering the anesthesia, RN, or physician in accordance with policies and procedures approved by the medical staff and using criteria written in the medical staff bylaws for postoperative monitoring of anesthesia.

(b) Chemical dependency services.

(1) Chemical dependency unit. A hospital may not admit patients to a chemical dependency services unit unless the unit is approved by the Department of State Health Services (department) as meeting the requirements of §133.163(q) of this title (relating to Spatial Requirements for New Construction).

(2) Admission criteria. A hospital providing chemical dependency services shall have written admission criteria that are applied uniformly to all patients who are admitted to the chemical dependency unit.

(A) The hospital's admission criteria shall include procedures to prevent the admission of minors for a condition which is not generally recognized as responsive to treatment in an inpatient setting for chemical dependency services.

(i) The following conditions are not generally recognized as responsive to treatment in a treatment facility for chemical dependency unless the minor to be admitted is qualified because of other disabilities, such as:

(I) cognitive disabilities due to mental retardation;

(II) learning disabilities; or

(III) psychiatric disorders.

(ii) A minor may be qualified for admission based on other disabilities which would be responsive to chemical dependency services.

(iii) A minor patient shall be separated from adult patients.

(B) The hospital shall have a preadmission examination procedure under which each patient's condition and medical history are reviewed by a member of the medical staff to determine whether the patient is likely to benefit significantly from an intensive inpatient program or assessment.

(C) A voluntarily admitted patient shall sign an admission consent form prior to admission to a chemical dependency unit which includes verification that the patient has been informed of the services to be provided and the estimated charges.

(3) Compliance. A hospital providing chemical dependency services in an identifiable unit within the hospital shall comply with Chapter 448, Subchapter B of this title (relating to Standard of Care Applicable to All Providers).

(c) Comprehensive medical rehabilitation services.

(1) Rehabilitation units. A hospital may not admit patients to a comprehensive medical rehabilitation services unit unless the unit is approved by the department as meeting the requirements of §133.163(z) of this title.

(2) Equipment and space. The hospital shall have the necessary equipment and sufficient space to implement the treatment plan described in paragraph (7)(C) of this subsection and allow for adequate

care. Necessary equipment is all equipment necessary to comply with all parts of the written treatment plan. The equipment shall be on-site or available through an arrangement with another provider. Sufficient space is the physical area of a hospital which in the aggregate, constitutes the total amount of the space necessary to comply with the written treatment plan.

(3) Emergency requirements. Emergency personnel, equipment, supplies and medications for hospitals providing comprehensive medical rehabilitation services shall be as follows.

(A) A hospital that provides comprehensive medical rehabilitation services shall have emergency equipment, supplies, medications, and designated personnel assigned for providing emergency care to patients and visitors.

(B) The emergency equipment, supplies, and medications shall be properly maintained and immediately accessible to all areas of the hospital. The emergency equipment shall be periodically tested according to the policy adopted, implemented and enforced by the hospital.

(C) At a minimum, the emergency equipment and supplies shall include those specified in subsection (e)(4) of this section.

(D) The personnel providing emergency care in accordance with this subsection shall be staffed for 24-hour coverage and accessible to all patients receiving comprehensive medical rehabilitation services. At least one person who is qualified by training to perform advanced cardiac life support and administer emergency drugs shall be on duty each shift.

(E) All direct patient care licensed personnel shall maintain current certification in cardiopulmonary resuscitation (CPR).

(4) Medications. A rehabilitation hospital's governing body shall adopt, implement and enforce policies and procedures that require all medications to be administered by licensed nurses, physicians, or other licensed professionals authorized by law to administer medications.

(5) Organization and Staffing.

(A) A hospital providing comprehensive medical rehabilitation services shall be organized and staffed to ensure the health and safety of the patients.

(i) All provided services shall be consistent with accepted professional standards and practice.

(ii) The organization of the services shall be appropriate to the scope of the services offered.

(iii) The hospital shall adopt, implement and enforce written patient care policies that govern the services it furnishes.

(B) The provision of comprehensive medical rehabilitation services in a hospital shall be under the medical supervision of a physician who is on duty and available, or who is on-call 24 hours each day.

(C) A hospital providing comprehensive medical rehabilitation services shall have a medical director or clinical director who supervises and administers the provision of comprehensive medical rehabilitation services.

(i) The medical director or clinical director shall be a physician who is board certified or eligible for board certification in physical medicine and rehabilitation, orthopedics, neurology, neurosurgery, internal medicine, or rheumatology as appropriate for the rehabilitation program.

(ii) The medical director or clinical director shall be qualified by training or at least two years training and experience to serve as medical director or clinical director. A person is qualified under this subsection if the person has training and experience in the treatment of rehabilitation patients in a rehabilitation setting.

(6) Admission criteria. A hospital providing comprehensive medical rehabilitation services shall have written admission criteria that are applied uniformly to all patients who are admitted to the comprehensive medical rehabilitation unit.

(A) The hospital's admission criteria shall include procedures to prevent the admission of a minor for a condition which is not generally recognized as responsive to treatment in an inpatient setting for comprehensive medical rehabilitation services.

(i) The following conditions are not generally recognized as responsive to treatment in an inpatient setting for comprehensive medical rehabilitation services unless the minor to be admitted is qualified because of other disabilities, such as:

(I) cognitive disabilities due to mental retardation;

(II) learning disabilities; or

(III) psychiatric disorders.

(ii) A minor may be qualified for admission based on other disabilities which would be responsive to comprehensive medical rehabilitation services.

(B) The hospital shall have a preadmission examination procedure under which each patient's condition and medical history are reviewed by a member of the medical staff to determine whether the patient is likely to benefit significantly from an intensive inpatient program or assessment.

(7) Care and services.

(A) A hospital providing comprehensive medical rehabilitation services shall use a coordinated interdisciplinary team which is directed by a physician and which works in collaboration to develop and implement the patient's treatment plan.

(i) The interdisciplinary team for comprehensive medical rehabilitation services shall have available to it, at the hospital at which the services are provided or by contract, members of the following professions as necessary to meet the treatment needs of the patient:

(I) physical therapy;

(II) occupational therapy;

(III) speech-language pathology;

(IV) therapeutic recreation;

(V) social services and case management;

(VI) dietetics;

(VII) psychology;

(VIII) respiratory therapy;

(IX) rehabilitative nursing;

(X) certified orthotics;

(XI) certified prosthetics;

(XII) pharmaceutical care; and

(XIII) in the case of a minor patient, persons who have specialized education and training in emotional, mental health, or chemical dependency problems, as well as the treatment of minors.

(ii) The coordinated interdisciplinary team approach used in the rehabilitation of each patient shall be documented by periodic entries made in the patient's medical record to denote:

(I) the patient's status in relationship to goal attainment; and

(II) that team conferences are held at least every two weeks to determine the appropriateness of treatment.

(B) An initial assessment and preliminary treatment plan shall be performed or established by the physician within 24 hours of admission.

(C) The physician in coordination with the interdisciplinary team shall establish a written treatment plan for the patient within seven working days of the date of admission.

(i) Comprehensive medical rehabilitation services shall be provided in accordance with the written treatment plan.

(ii) The treatment provided under the written treatment plan shall be provided by staff who are qualified to provide services under state law. The hospital shall establish written qualifications for services provided by each discipline for which there is no applicable state statute for professional licensure or certification.

(iii) Services provided under the written treatment plan shall be given in accordance with the orders of physicians, dentists, podiatrists or practitioners who are authorized by the governing body, hospital administration, and medical staff to order the services, and the orders shall be incorporated in the patient's record.

(iv) The written treatment plan shall delineate anticipated goals and specify the type, amount, frequency, and anticipated duration of service to be provided.

(v) Within 10 working days after the date of admission, the written treatment plan shall be provided. It shall be in the person's primary language, if practicable. What is or would have been practicable shall be determined by the facts and circumstances of each case. The written treatment plan shall be provided to:

(I) the patient;

(II) a person designated by the patient; and

(III) upon request, a family member, guardian, or individual who has demonstrated on a routine basis responsibility and participation in the patient's care or treatment, but only with the patient's consent unless such consent is not required by law.

(vi) The written treatment plan shall be reviewed by the interdisciplinary team at least every two weeks.

(vii) The written treatment plan shall be revised by the interdisciplinary team if a comprehensive reassessment of the patient's status or the results of a patient case review conference indicates the need for revision.

(viii) The revision shall be incorporated into the patient's record within seven working days after the revision.

(ix) The revised treatment plan shall be reduced to writing in the person's primary language, if practicable, and provided to:

(I) the patient;

(II) a person designated by the patient; and

(III) upon request, a family member, guardian, or individual who has demonstrated on a routine basis responsibility and participation in the patient's care or treatment, but only with the patient's consent unless such consent is not required by law.

(8) Discharge and continuing care plan. The patient's interdisciplinary team shall prepare a written continuing care plan that addresses the patient's needs for care after discharge.

(A) The continuing care plan for the patient shall include recommendations for treatment and care and information about the availability of resources for treatment or care.

(B) If the patient's interdisciplinary team deems it impracticable to provide a written continuing care plan prior to discharge, the patient's interdisciplinary team shall provide the written continuing care plan to the patient within two working days after the date of discharge.

(C) Prior to discharge or within two working days after the date of discharge, the written continuing care plan shall be provided in the person's primary language, if practicable, to:

(i) the patient;

(ii) a person designated by the patient; and

(iii) upon request, to a family member, guardian, or individual who has demonstrated on a routine basis responsibility and participation in the patient's care or treatment, but only with the patient's consent unless such consent is not required by law.

(d) Dietary services. The hospital shall have organized dietary services that are directed and staffed by adequate qualified personnel. However, a hospital that has a contract with an outside food management company or an arrangement with another hospital may meet this requirement if the company or other hospital has a dietitian who serves the hospital on a full-time, part-time, or consultant basis, and if the company or other hospital maintains at least the minimum requirements specified in this section, and provides for the frequent and systematic liaison with the hospital medical staff for recommendations of dietetic policies affecting patient treatment. The hospital shall ensure that there are sufficient personnel to respond to the dietary needs of the patient population being served.

(1) Organization.

(A) The hospital shall have a full-time employee who is qualified by experience or training to serve as director of the food and dietetic service, and be responsible for the daily management of the dietary services.

(B) There shall be a qualified dietitian who works full-time, part-time, or on a consultant basis. If by consultation, such services shall occur at least once per month for not less than eight hours. The dietitian shall:

(i) be currently licensed under the laws of this state to use the titles of licensed dietitian or provisional licensed dietitian, or be a registered dietitian;

(ii) maintain standards for professional practice;

(iii) supervise the nutritional aspects of patient care;

(iv) make an assessment of the nutritional status and adequacy of nutritional regimen, as appropriate;

(v) provide diet counseling and teaching, as appropriate;

(vi) document nutritional status and pertinent information in patient medical records, as appropriate;

(vii) approve menus; and

(viii) approve menu substitutions.

(C) There shall be administrative and technical personnel competent in their respective duties. The administrative and technical personnel shall:

(i) participate in established departmental or hospital training pertinent to assigned duties;

(ii) conform to food handling techniques in accordance with paragraph (2)(E)(viii) of this subsection;

(iii) adhere to clearly defined work schedules and assignment sheets; and

(iv) comply with position descriptions which are job specific.

(2) Director. The director shall:

(A) comply with a position description which is job specific;

(B) clearly delineate responsibility and authority;

(C) participate in conferences with administration and department heads;

(D) establish, implement, and enforce policies and procedures for the overall operational components of the department to include, but not be limited to:

(i) quality assessment and performance improvement program;

(ii) frequency of meals served;

(iii) nonroutine occurrences; and

(iv) identification of patient trays; and

(E) maintain authority and responsibility for the following, but not be limited to:

(i) orientation and training;

(ii) performance evaluations;

(iii) work assignments;

(iv) supervision of work and food handling techniques;

(v) procurement of food, paper, chemical, and other supplies, to include implementation of first-in first-out rotation system for all food items;

(vi) ensuring there is a four-day food supply on hand at all times;

(vii) menu planning; and

(viii) ensuring compliance with §§229.161 - 229.171 of this title (relating to Texas Food Establishments).

(3) Diets. Menus shall meet the needs of the patients.

(A) Therapeutic diets shall be prescribed by the physician(s) responsible for the care of the patients. The dietary department of the hospital shall:

(i) establish procedures for the processing of therapeutic diets to include, but not be limited to:

(I) accurate patient identification;

(II) transcription from nursing to dietary services;

(III) diet planning by a dietitian;

(IV) regular review and updating of diet when necessary; and

(V) written and verbal instruction to patient and family. It shall be in the patient's primary language, if practicable, prior to discharge. What is or would have been practicable shall be determined by the facts and circumstances of each case;

(ii) ensure that therapeutic diets are planned in writing by a qualified dietitian;

(iii) ensure that menu substitutions are approved by a qualified dietitian;

(iv) document pertinent information about the patient's response to a therapeutic diet in the medical record; and

(v) evaluate therapeutic diets for nutritional adequacy.

(B) Nutritional needs shall be met in accordance with recognized dietary practices and in accordance with orders of the physician(s) or appropriately credentialed practitioner(s) responsible for the care of the patients. The following requirements shall be met.

(i) Menus shall provide a sufficient variety of foods served in adequate amounts at each meal according to the guidance provided in the Recommended Dietary Allowances (RDA), as published by the Food and Nutrition Board, Commission on Life Sciences, National Research Council, Tenth edition, 1989, which may be obtained by writing the National Academies Press, 500 Fifth Street, NW Lockbox 285, Washington, D.C. 20055, telephone (888) 624-8373.

(ii) A maximum of 15 hours shall not be exceeded between the last meal of the day (i.e. supper) and the breakfast meal, unless a substantial snack is provided. The hospital shall adopt, implement, and enforce a policy on the definition of "substantial" to meet each patient's varied nutritional needs.

(C) A current therapeutic diet manual approved by the dietitian and medical staff shall be readily available to all medical, nursing, and food service personnel. The therapeutic manual shall:

(i) be revised as needed, not to exceed 5 years;

(ii) be appropriate for the diets routinely ordered in the hospital;

(iii) have standards in compliance with the RDA;

(iv) contain specific diets which are not in compliance with RDA; and

(v) be used as a guide for ordering and serving diets.

(e) Emergency services. All licensed hospital locations, including multiple-location sites, shall have an emergency suite that complies with §133.161(a)(1)(A) of this title (relating to Requirements for Buildings in Which Existing Licensed Hospitals are Located) or §133.163(f) of this title, and the following.

(1) Organization. The organization of the emergency services shall be appropriate to the scope of the services offered.

(A) The services shall be organized under the direction of a qualified member of the medical staff who is the medical director or clinical director.

(B) The services shall be integrated with other departments of the hospital.

(C) The policies and procedures governing medical care provided in the emergency suite shall be established by and shall be a continuing responsibility of the medical staff.

(D) Medical records indicating patient identification, complaint, physician, nurse, time admitted to the emergency suite, treatment, time discharged, and disposition shall be maintained for all emergency patients.

(2) Personnel.

(A) There shall be adequate medical and nursing personnel qualified in emergency care to meet the written emergency procedures and needs anticipated by the hospital.

(B) Except for comprehensive medical rehabilitation hospitals and pediatric and adolescent hospitals that generally provide care that is not administered for or in expectation of compensation:

(i) there shall be on duty and available at all times at least one person qualified as determined by the medical staff to initiate immediate appropriate lifesaving measures; and

(ii) in general hospitals where the emergency treatment area is not contiguous with other areas of the hospital that maintain 24 hour staffing by qualified staff (including but not limited to separation by one or more floors in multiple-occupancy buildings), qualified personnel must be physically present in the emergency treatment area at all times.

(C) Except for comprehensive medical rehabilitation hospitals and pediatric and adolescent hospitals that generally provide care that is not administered for or in expectation of compensation, the hospital shall provide that one or more physicians shall be available at all times for emergencies, as follows.

(i) General hospitals, except for hospitals designated as critical access hospitals (CAHs) by the Centers for Medicare & Medicaid Services (CMS), located in counties with a population of 100,000 or more shall have a physician qualified to provide emergency medical care on duty in the emergency treatment area at all times.

(ii) Special hospitals, hospitals designated as CAHs by the CMS, and general hospitals located in counties with a population of less than 100,000 shall have a physician on-call and able to respond in person, or by radio or telephone within 30 minutes.

(D) Schedules, names, and telephone numbers of all physicians and others on emergency call duty, including alternates, shall be maintained. Schedules shall be retained for no less than one year.

(3) Supplies and equipment. Adequate age appropriate supplies and equipment shall be available and in readiness for use. Equipment and supplies shall be available for the administration of intravenous medications as well as facilities for the control of bleeding and emergency splinting of fractures. Provision shall be made for the storage of blood and blood products as needed. The emergency equipment shall be periodically tested according to the policy adopted, implemented and enforced by the hospital.

(4) Required emergency equipment. At a minimum, the age appropriate emergency equipment and supplies shall include the following:

(A) emergency call system;

(B) oxygen;

(C) mechanical ventilatory assistance equipment, including airways, manual breathing bag, and mask;

(D) cardiac defibrillator;

(E) cardiac monitoring equipment;

(F) laryngoscopes and endotracheal tubes;

(G) suction equipment;

(H) emergency drugs and supplies specified by the medical staff;

(I) stabilization devices for cervical injuries;

(J) blood pressure monitoring equipment; and

(K) pulse oximeter or similar medical device to measure blood oxygenation.

(5) Participation in local emergency medical service (EMS) system.

(A) General hospitals shall participate in the local EMS system, based on the hospital's capabilities and capacity, and the locale's existing EMS plan and protocols.

(B) The provisions of subparagraph (A) of this paragraph do not apply to a comprehensive medical rehabilitation hospital or a pediatric and adolescent hospital that generally provides care that is not administered for or in expectation of compensation.

(6) Emergency services for survivors of sexual assault.

(A) The hospital shall develop, implement and enforce policies and procedures to ensure that a sexual assault survivor who presents to the hospital following a sexual assault receives one of the following:

(i) the care specified under subparagraph (B) of this paragraph; or

(ii) stabilization and transfer to a health care facility designated in a community-wide plan as the health care facility for treating sexual assault survivors, where the survivor will receive the care specified under subparagraph (B) of this paragraph.

(B) A hospital providing care to a sexual assault survivor shall provide the survivor with the following:

(i) a forensic medical examination in accordance with Government Code, Chapter 420, Subchapter B, when the examination has been requested by a law enforcement agency under Code of Criminal Procedure, Article 56.06, or is conducted under Code of Criminal Procedure, Article 56.065. If a sexual assault survivor is age 18 or older and has not reported the assault to a law enforcement agency, a hospital shall provide this forensic medical examination, when the sexual assault survivor has arrived at the facility not later than 96 hours after the time the assault occurred and has consented to the examination;

(ii) a private area, if available, to wait or speak with the appropriate medical, legal, or sexual assault crisis center staff or volunteer until a physician, nurse, or physician assistant is able to treat the survivor;

(iii) access to a sexual assault program advocate, if available, as provided by Code of Criminal Procedure, Article 56.045;

(iv) the information form required by Health and Safety Code, §323.005;

(v) a private treatment room, if available;

(vi) if indicated by the history of contact, access to appropriate prophylaxis for exposure to sexually transmitted infections; and

(vii) the name and telephone number of the nearest sexual assault crisis center.

(C) The hospital must obtain documented consent before providing the forensic medical examination and treatment.

(D) Upon request, the hospital shall submit to the department their plan for the provision of service to sexual assault survivors. The plan must describe how the hospital will ensure that the services required under subparagraph (B) of this paragraph will be provided.

(i) The hospital shall submit the plan by the 60th day after the department makes the request.

(ii) The department will approve or reject the plan not later than 120th day following the submission of the plan.

(iii) If the department is not able to approve the plan, the department will return the plan to the hospital and will identify the specific provisions with which the hospital's plan failed to comply.

(iv) The hospital shall correct and resubmit the plan to the department for approval not later than the 90th day after the plan is returned to the hospital.

(f) Governing body.

(1) Legal responsibility. There shall be a governing body responsible for the organization, management, control, and operation of the hospital, including appointment of the medical staff. For hospitals owned and operated by an individual or by partners, the individual or partners shall be considered the governing body.

(2) Organization. The governing body shall be formally organized in accordance with a written constitution and bylaws which clearly set forth the organizational structure and responsibilities.

(3) Meeting records. Records of governing body meetings shall be maintained.

(4) Responsibilities relating to the medical staff.

(A) The governing body shall ensure that the medical staff has current bylaws, rules, and regulations which are implemented and enforced.

(B) The governing body shall approve medical staff bylaws and other medical staff rules and regulations.

(C) The governing body shall determine, in accordance with state law and with the advice of the medical staff, which categories of practitioners are eligible candidates for appointment to the medical staff.

(i) In considering applications for medical staff membership and privileges or the renewal, modification, or revocation of medical staff membership and privileges, the governing body must ensure that each physician, podiatrist, and dentist is afforded procedural due process.

(I) If a hospital's credentials committee has failed to take action on a completed application as required by subclause (VIII) of this clause, or a physician, podiatrist, or dentist is subject to a professional review action that may adversely affect his medical staff membership or privileges, and the physician, podiatrist, or dentist believes that mediation of the dispute is desirable, the physician, podiatrist, or dentist may require the hospital to participate in mediation as provided in Civil Practice and Remedies Code (CPRC), Chapter 154. The mediation shall be conducted by a person meeting the qualifications required by CPRC §154.052 and within a reasonable period of time.

(II) Subclause (I) of this clause does not authorize a cause of action by a physician, podiatrist, or dentist against the hospital other than an action to require a hospital to participate in mediation.

(III) An applicant for medical staff membership or privileges may not be denied membership or privileges on any ground that is otherwise prohibited by law.

(IV) A hospital's bylaw requirements for staff privileges may require a physician, podiatrist, or dentist to document the person's current clinical competency and professional training and experience in the medical procedures for which privileges are requested.

(V) In granting or refusing medical staff membership or privileges, a hospital may not differentiate on the basis of the academic medical degree held by a physician.

(VI) Graduate medical education may be used as a standard or qualification for medical staff membership or privileges for a physician, provided that equal recognition is given to training programs accredited by the Accreditation Council for Graduate Medical Education and by the American Osteopathic Association.

(VII) Board certification may be used as a standard or qualification for medical staff membership or privileges for a physician, provided that equal recognition is given to certification programs approved by the American Board of Medical Specialties and the Bureau of Osteopathic Specialists.

(VIII) A hospital's credentials committee shall act expeditiously and without unnecessary delay when a licensed physician, podiatrist, or dentist submits a completed application for medical staff membership or privileges. The hospital's credentials committee shall take action on the completed application not later than the 90th day after the date on which the application is received. The governing body of the hospital shall take final action on the application for medical staff membership or privileges not later than the 60th day after the date on which the recommendation of the credentials committee is received. The hospital must notify the applicant in writing of the hospital's final action, including a reason for denial or restriction of privileges, not later than the 20th day after the date on which final action is taken.

(ii) The governing body is authorized to adopt, implement and enforce policies concerning the granting of clinical privileges to advanced practice nurses and physician assistants, including policies relating to the application process, reasonable qualifications for privileges, and the process for renewal, modification, or revocation of privileges.

(I) If the governing body of a hospital has adopted, implemented and enforced a policy of granting clinical privileges to advanced practice nurses or physician assistants, an individual advanced practice nurse or physician assistant who qualifies for privileges under that policy shall be entitled to certain procedural rights to provide fairness of process, as determined by the governing body of the hospital, when an application for privileges is submitted to the hospital. At a minimum, any policy adopted shall specify a reasonable period for the processing and consideration of the application and shall provide for written notification to the applicant of any final action on the application by the hospital, including any reason for denial or restriction of the privileges requested.

(II) If an advanced practice nurse or physician assistant has been granted clinical privileges by a hospital, the hospital may not modify or revoke those privileges without providing certain procedural rights to provide fairness of process, as determined by the governing body of the hospital, to the advanced practice nurse or physician assistant. At a minimum, the hospital shall provide the advanced practice nurse or physician assistant written reasons for the modification or revocation of privileges and a mechanism for appeal to the appropriate committee or body within the hospital, as determined by the governing body of the hospital.

(III) If a hospital extends clinical privileges to an advanced practice nurse or physician assistant conditioned on the advanced practice nurse or physician assistant having a sponsoring or collaborating relationship with a physician and that relationship ceases to exist, the advanced practice nurse or physician assistant and the physician shall provide written notification to the hospital that the relationship no longer exists. Once the hospital receives such notice from an advanced practice nurse or physician assistant and the physician, the hospital shall be deemed to have met its obligations under this section by notifying the advanced practice nurse or physician assistant in writing that the advanced practice nurse's or physician assistant's clinical privileges no longer exist at that hospital.

(IV) Nothing in this clause shall be construed as modifying Subtitle B, Title 3, Occupations Code, Chapter 204 or 301, or any other law relating to the scope of practice of physicians, advanced practice nurses, or physician assistants.

(V) This clause does not apply to an employer-employee relationship between an advanced practice nurse or physician assistant and a hospital.

(D) The governing body shall ensure that the hospital complies with the requirements concerning physician communication and contracts as set out in Health and Safety Code (HSC), §241.1015 (Physician Communication and Contracts); and

(E) The governing body shall ensure the hospital complies with the requirements for reporting to the Texas Medical Board the results and circumstances of any professional review action in accordance with the Medical Practice Act, Texas Occupations Code, §160.002 and §160.003.

(F) The governing body shall be responsible for and ensure that any policies and procedures adopted by the governing body to implement the requirements of this chapter shall be implemented and enforced.

(5) Hospital administration. The governing body shall appoint a chief executive officer or administrator who is responsible for managing the hospital.

(6) Patient care. In accordance with hospital policy adopted, implemented and enforced, the governing body shall ensure that:

(A) every patient is under the care of:

(i) a physician. This provision is not to be construed to limit the authority of a physician to delegate tasks to other qualified health care personnel to the extent recognized under state law or the state's regulatory mechanism;

(ii) a dentist who is legally authorized to practice dentistry by the state and who is acting within the scope of his or her license; or

(iii) a podiatrist, but only with respect to functions which he or she is legally authorized by the state to perform.

(B) patients are admitted to the hospital only by members of the medical staff who have been granted admitting privileges; and

(C) a physician is on duty or on-call at all times.

(7) Services. The governing body shall be responsible for all services furnished in the hospital, whether furnished directly or under contract. The governing body shall ensure that services are provided in a safe and effective manner that permits the hospital to comply with all applicable rules and standards.

(8) Nurse Staffing. The governing body shall adopt, implement and enforce a written nurse staffing policy to ensure that an adequate number and skill mix of nurses are available to meet the level of patient care needed. The governing body policy shall require that hospital administration adopt, implement and enforce a nurse staffing plan and policies that:

(A) require significant consideration be given to the nurse staffing plan recommended by the hospital's nurse staffing committee and the committee's evaluation of any existing plan;

(B) are based on the needs of each patient care unit and shift and on evidence relating to patient care needs;

(C) ensure that all nursing assignments consider client safety, and are commensurate with the nurse's educational preparation, experience, knowledge, and physical and emotional ability;

(D) require use of the official nurse services staffing plan as a component in setting the nurse staffing budget;

(E) encourage nurses to provide input to the nurse staffing committee relating to nurse staffing concerns;

(F) protect from retaliation nurses who provide input to the nurse staffing committee; and

(G) comply with subsection (o) of this section.

(g) Infection control. The hospital shall provide a sanitary environment to avoid sources and transmission of infections and communicable diseases. There shall be an active program for the prevention, control, and surveillance of infections and communicable diseases.

(1) Organization and policies. A person shall be designated as infection control professional. The hospital shall ensure that policies governing prevention, control and surveillance of infections and communicable diseases are developed, implemented and enforced.

(A) There shall be a system for identifying, reporting, investigating, and controlling health care associated infections and communicable diseases between patients and personnel.

(B) The infection control professional shall maintain a log of all reportable diseases and health care associated infections designated as epidemiologically significant according to the hospital's infection control policies.

(C) A written policy shall be adopted, implemented and enforced for reporting all reportable diseases to the local health authority and the Infectious Disease Surveillance and Epidemiology Branch, Department of State Health Services, Mail Code 2822, P. O. Box 149347, Austin, Texas 78714-9347, in accordance with Chapter 97 of this title (relating to Communicable Diseases), and Health and Safety Code, §§98.103, 98.104, and 98.1045 (relating to Reportable Infections, Alternative for Reportable Surgical Site Infections, and Reporting of Preventable Adverse Events).

(D) The infection control program shall include active participation by the pharmacist.

(2) Responsibilities of the chief executive officer (CEO), medical staff, and chief nursing officer (CNO). The CEO, the medical staff, and the CNO shall be responsible for the following.

(A) The hospital-wide quality assessment and performance improvement program and training programs shall address problems identified by the infection control professional.

(B) Successful corrective action plans in affected problem areas shall be implemented.

(3) Universal precautions. The hospital shall adopt, implement, and enforce a written policy to monitor compliance of the hospital and its personnel and medical staff with universal precautions in accordance with HSC Chapter 85, Acquired Immune Deficiency Syndrome and Human Immunodeficiency Virus Infection.

(h) Laboratory services. The hospital shall maintain directly, or have available adequate laboratory services to meet the needs of its patients.

(1) Hospital laboratory services. A hospital that provides laboratory services shall comply with the Clinical Laboratory Improvement Amendments of 1988 (CLIA 1988), in accordance with the requirements specified in 42 Code of Federal Regulations (CFR), §§493.1 - 493.1780. CLIA 1988 applies to all hospitals with laboratories that examine human specimens for the diagnosis, prevention, or treatment of any disease or impairment of, or the assessment of the health of, human beings.

(2) Contracted laboratory services. The hospital shall ensure that all laboratory services provided to its patients through a contractual agreement are performed in a facility certified in the appropriate specialties and subspecialties of service in accordance with the requirements specified in 42 CFR Part 493 to comply with CLIA 1988.

(3) Adequacy of laboratory services. The hospital shall ensure the following.

(A) Emergency laboratory services shall be available 24 hours a day.

(B) A written description of services provided shall be available to the medical staff.

(C) The laboratory shall make provision for proper receipt and reporting of tissue specimens.

(D) The medical staff and a pathologist shall determine which tissue specimens require a macroscopic (gross) examination and which require both macroscopic and microscopic examination.

(E) When blood and blood components are stored, there shall be written procedures readily available containing directions on how to maintain them within permissible temperatures and including instructions to be followed in the event of a power failure or other disruption of refrigeration. A label or tray with the recipient's first and last names and identification number, donor unit number and interpretation of compatibility, if performed, shall be attached securely to the blood container.

(F) The hospital shall establish a mechanism for ensuring that the patient's physician or other licensed health care professional is made aware of critical value lab results, as established by the medical staff, before or after the patient is discharged.

(4) Chemical hygiene. A hospital that provides laboratory services shall adopt, implement, and enforce written policies and procedures to manage, minimize, or eliminate the risks to laboratory personnel of exposure to potentially hazardous chemicals in the laboratory which may occur during the normal course of job performance.

(i) Linen and laundry services. The hospital shall provide sufficient clean linen to ensure the comfort of the patient.

(1) For purposes of this subsection, contaminated linen is linen which has been soiled with blood or other potentially infectious materials or may contain sharps. Other potentially infectious materials means:

(A) the following human body fluids: semen, vaginal secretions, cerebrospinal fluid, synovial fluid, pleural fluid, pericardial fluid, peritoneal fluid, amniotic fluid, saliva in dental procedures, any body fluid that is visibly contaminated with blood, and all body fluids in situations where it is difficult or impossible to differentiate between body fluids;

(B) any unfixed tissue or organ (other than intact skin) from a human (living or dead); and

(C) Human Immunodeficiency Virus (HIV)-containing cell or tissue cultures, organ cultures, and HIV or Hepatitis B Virus (HBV)-containing culture medium or other solutions; and blood, organs, or other tissues from experimental animals infected with HIV or HBV.

(2) The hospital, whether it operates its own laundry or uses commercial service, shall ensure the following.

(A) Employees of a hospital involved in transporting, processing, or otherwise handling clean or soiled linen shall be given initial and follow-up in-service training to ensure a safe product for patients and to safeguard employees in their work.

(B) Clean linen shall be handled, transported, and stored by methods that will ensure its cleanliness.

(C) All contaminated linen shall be placed and transported in bags or containers labeled or color-coded.

(D) Employees who have contact with contaminated linen shall wear gloves and other appropriate personal protective equipment.

(E) Contaminated linen shall be handled as little as possible and with a minimum of agitation. Contaminated linen shall not be sorted or rinsed in patient care areas.

(F) All contaminated linen shall be bagged or put into carts at the location where it was used.

(i) Bags containing contaminated linen shall be closed prior to transport to the laundry.

(ii) Whenever contaminated linen is wet and presents a reasonable likelihood of soak-through of or leakage from the bag or container, the linen shall be deposited and transported in bags that prevent leakage of fluids to the exterior.

(iii) All linen placed in chutes shall be bagged.

(iv) If chutes are not used to convey linen to a central receiving or sorting room, then adequate space shall be allocated on the various nursing units for holding the bagged contaminated linen.

(G) Linen shall be processed as follows:

(i) If hot water is used, linen shall be washed with detergent in water with a temperature of at least 71 degrees Centigrade (160 degrees Fahrenheit) for 25 minutes. Hot water requirements specified in Table 5 of §133.169(e) of this title (relating to Tables) shall be met.

(ii) If low-temperature (less than or equal to 70 degrees Centigrade) (158 degrees Fahrenheit) laundry cycles are used,

chemicals suitable for low-temperature washing at proper use concentration shall be used.

(iii) Commercial dry cleaning of fabrics soiled with blood also renders these items free of the risk of pathogen transmission.

(H) Flammable liquids shall not be used to process laundry, but may be used for equipment maintenance.

(j) Medical record services. The hospital shall have a medical record service that has administrative responsibility for medical records. A medical record shall be maintained for every individual who presents to the hospital for evaluation or treatment.

(1) The organization of the medical record service shall be appropriate to the scope and complexity of the services performed. The hospital shall employ or contract with adequate personnel to ensure prompt completion, filing, and retrieval of records.

(2) The hospital shall have a system of coding and indexing medical records. The system shall allow for timely retrieval by diagnosis and procedure, in order to support medical care evaluation studies.

(3) The hospital shall adopt, implement, and enforce a policy to ensure that the hospital complies with HSC, Chapter 241, Subchapter G (Disclosure of Health Care Information).

(4) The medical record shall contain information to justify admission and continued hospitalization, support the diagnosis, reflect significant changes in the patient's condition, and describe the patient's progress and response to medications and services. Medical records shall be accurately written, promptly completed, properly filed and retained, and accessible.

(5) Medical record entries must be legible, complete, dated, timed, and authenticated in written or electronic form by the person responsible for providing or evaluating the service provided, consistent with hospital policies and procedures.

(6) All orders (except verbal orders) must be dated, timed, and authenticated the next time the prescriber or another practitioner who is responsible for the care of the patient and has been credentialed by the medical staff and granted privileges which are consistent with the written orders provides care to the patient, assesses the patient, or documents information in the patient's medical record.

(7) All verbal orders must be dated, timed, and authenticated within 48 hours by the prescriber or another practitioner who is responsible for the care of the patient and has been credentialed by the medical staff and granted privileges which are consistent with the written orders.

(A) Use of signature stamps by physicians and other licensed practitioners credentialed by the medical staff may be allowed in hospitals when the signature stamp is authorized by the individual whose signature the stamp represents. The administrative offices of the hospital shall have on file a signed statement to the effect that he or she is the only one who has the stamp and uses it. The use of a signature stamp by any other person is prohibited.

(B) A list of computer codes and written signatures shall be readily available and shall be maintained under adequate safeguards.

(C) Signatures by facsimile shall be acceptable. If received on a thermal machine, the facsimile document shall be copied onto regular paper.

(8) Medical records (reports and printouts) shall be retained by the hospital in their original or legally reproduced form for a period of at least ten years. A legally reproduced form is a medical record retained in hard copy, microform (microfilm or microfiche), or other electronic medium. Films, scans, and other image records shall be retained for a period of at least five years. For retention purposes, medical records that shall be preserved for ten years include:

(A) identification data;

(B) the medical history of the patient;

(C) evidence of a physical examination, including a health history, performed no more than 30 days prior to admission or within 24 hours after admission. The medical history and physical examination shall be placed in the patient's medical record within 24 hours after admission.

(D) an updated medical record entry documenting an examination for any changes in the patient's condition when the medical history and physical examination are completed within 30 days before admission. This updated examination shall be completed and documented in the patient's medical record within 24 hours after admission.

(E) admitting diagnosis;

(F) diagnostic and therapeutic orders;

(G) properly executed informed consent forms for procedures and treatments specified by the medical staff, or by federal or state laws if applicable, to require written patient consent;

(H) clinical observations, including the results of therapy and treatment, all orders, nursing notes, medication records, vital signs, and other information necessary to monitor the patient's condition;

(I) reports of procedures, tests, and their results, including laboratory, pathology, and radiology reports;

(J) results of all consultative evaluations of the patient and appropriate findings by clinical and other staff involved in the care of the patient;

(K) discharge summary with outcome of hospitalization, disposition of care, and provisions for follow-up care; and

(L) final diagnosis with completion of medical records within 30 calendar days following discharge.

(9) If a patient was less than 18 years of age at the time he was last treated, the hospital may authorize the disposal of those medical records relating to the patient on or after the date of his 20th birthday or on or after the 10th anniversary of the date on which he was last treated, whichever date is later.

(10) The hospital shall not destroy medical records that relate to any matter that is involved in litigation if the hospital knows the litigation has not been finally resolved.

(11) If a licensed hospital should close, the hospital shall notify the department at the time of closure the disposition of the medical records, including the location of where the medical records will be stored and the identity and telephone number of the custodian of the records.

(k) Medical staff.

(1) The medical staff shall be composed of physicians and may also be composed of podiatrists, dentists and other practitioners appointed by the governing body.

(A) The medical staff shall periodically conduct appraisals of its members according to medical staff bylaws.

(B) The medical staff shall examine credentials of candidates for medical staff membership and make recommendations to the governing body on the appointment of the candidate.

(2) The medical staff shall be well-organized and accountable to the governing body for the quality of the medical care provided to patients.

(A) The medical staff shall be organized in a manner approved by the governing body.

(B) If the medical staff has an executive committee, a majority of the members of the committee shall be doctors of medicine or osteopathy.

(C) Records of medical staff meetings shall be maintained.

(D) The responsibility for organization and conduct of the medical staff shall be assigned only to an individual physician.

(E) Each medical staff member shall sign a statement signifying they will abide by medical staff and hospital policies.

(3) The medical staff shall adopt, implement, and enforce bylaws, rules, and regulations to carry out its responsibilities. The bylaws shall:

(A) be approved by the governing body;

(B) include a statement of the duties and privileges of each category of medical staff (e.g., active, courtesy, consultant);

(C) describe the organization of the medical staff;

(D) describe the qualifications to be met by a candidate in order for the medical staff to recommend that the candidate be appointed by the governing body;

(E) include criteria for determining the privileges to be granted and a procedure for applying the criteria to individuals requesting privileges; and

(F) include a requirement that a physical examination and medical history be done no more than 30 days before or 24 hours after an admission for each patient by a physician or other qualified practitioner who has been granted these privileges by the medical staff. The medical history and physical examination shall be placed in the patient's medical record within 24 hours after admission. When the medical history and physical examination are completed within the 30 days before admission, an updated examination for any changes in the patient's condition must be completed and documented in the patient's medical record within 24 hours after admission.

(l) Mental health services.

(1) Mental health services unit. A hospital may not admit patients to a mental health services unit unless the unit is approved by the department as meeting the requirements of §133.163(q) of this title.

(2) Admission criteria. A hospital providing mental health services shall have written admission criteria that are applied uniformly to all patients who are admitted to the service.

(A) The hospital's admission criteria shall include procedures to prevent the admission of minors for a condition which is not generally recognized as responsive to treatment in an inpatient setting for mental health services.

(i) The following conditions are not generally recognized as responsive to treatment in a hospital unless the minor to be admitted is qualified because of other disabilities, such as:

(I) cognitive disabilities due to mental retardation; or

(II) learning disabilities.

(ii) A minor may be qualified for admission based on other disabilities which would be responsive to mental health services.

(B) The medical record shall contain evidence that admission consent was given by the patient, the patient's legal guardian, or the managing conservator, if applicable.

(C) The hospital shall have a preadmission examination procedure under which each patient's condition and medical history are reviewed by a member of the medical staff to determine whether the patient is likely to benefit significantly from an intensive inpatient program or assessment.

(D) A voluntarily admitted patient shall sign an admission consent form prior to admission to a mental health unit which includes verification that the patient has been informed of the services to be provided and the estimated charges.

(3) Compliance. A hospital providing mental health services shall comply with the following rules administered by the department. The rules are:

(A) Chapter 411, Subchapter J of this title (relating to Standards of Care and Treatment in Psychiatric Hospitals);

(B) Chapter 404, Subchapter E of this title (relating to Rights of Persons Receiving Mental Health Services);

(C) Chapter 405, Subchapter E of this title (relating to Electroconvulsive Therapy (ECT));

(D) Chapter 414, Subchapter I of this title (relating to Consent to Treatment with Psychoactive Medication--Mental Health Services); and

(E) Chapter 415, Subchapter F of this title (relating to Interventions in Mental Health Programs).

(m) Mobile, transportable, and relocatable units. The hospital shall adopt, implement and enforce procedures which address the potential emergency needs for those inpatients who are taken to mobile units on the hospital's premises for diagnostic procedures or treatment.

(n) Nuclear medicine services. If the hospital provides nuclear medicine services, these services shall meet the needs of the patients in accordance with acceptable standards of practice and be licensed in accordance with §289.256 of this title (relating to Medical and Veterinary Use of Radioactive Material).

(1) Policies and procedures. Policies and procedures shall be adopted, implemented, and enforced which will describe the services nuclear medicine provides in the hospital and how employee and patient safety will be maintained.

(2) Organization and staffing. The organization of the nuclear medicine services shall be appropriate to the scope and complexity of the services offered.

(A) There shall be a medical director or clinical director who is a physician qualified in nuclear medicine.

(B) The qualifications, training, functions, and responsibilities of nuclear medicine personnel shall be specified by the medical director or clinical director and approved by the medical staff.

(3) Delivery of services. Radioactive materials shall be prepared, labeled, used, transported, stored, and disposed of in accor-

dance with acceptable standards of practice and in accordance with §289.256 of this title.

(A) In-house preparation of radiopharmaceuticals shall be by, or under, the direct supervision of an appropriately trained licensed pharmacist or physician.

(B) There shall be proper storage and disposal of radioactive materials.

(C) If clinical laboratory tests are performed by the nuclear medicine services staff, the nuclear medicine staff shall comply with CLIA 1988 in accordance with the requirements specified in 42 CFR Part 493.

(D) Nuclear medicine workers shall be provided personnel monitoring dosimeters to measure their radiation exposure. Exposure reports and documentation shall be available for review.

(4) Equipment and supplies. Equipment and supplies shall be appropriate for the types of nuclear medicine services offered and shall be maintained for safe and efficient performance. The equipment shall be inspected, tested, and calibrated at least annually by qualified personnel.

(5) Records. The hospital shall maintain signed and dated reports of nuclear medicine interpretations, consultations, and procedures.

(A) The physician approved by the medical staff to interpret diagnostic procedures shall sign and date the interpretations of these tests.

(B) The hospital shall maintain records of the receipt and disposition of radiopharmaceuticals until disposal is authorized by the department's Radiation Safety Licensing Branch in accordance with §289.256 of this title.

(C) Nuclear medicine services shall be ordered only by an individual whose scope of state licensure and whose defined staff privileges allow such referrals.

(o) Nursing services. The hospital shall have an organized nursing service that provides 24-hour nursing services as needed.

(1) Organization. The hospital shall have a well-organized service with a plan of administrative authority and delineation of responsibilities for patient care.

(A) Nursing services shall be under the administrative authority of a chief nursing officer (CNO) who shall be an RN and comply with one of the following:

(i) possess a master's degree in nursing;

(ii) possess a master's degree in health care administration or business administration;

(iii) possess a master's degree in a health-related field obtained through a curriculum that included courses in administration and management; or

(iv) be progressing under a written plan to obtain the nursing administration qualifications associated with a master's degree in nursing. The plan shall:

(I) describe efforts to obtain the knowledge associated with graduate education and to increase administrative and management skills and experience;

(II) include courses related to leadership, administration, management, performance improvement and theoretical approaches to delivering nursing care; and

(III) provide a time-line for accomplishing skills.

(B) The CNO in hospitals with 100 or fewer licensed beds and located in counties with a population of less than 50,000, or in hospitals that have been certified by the Centers for Medicare and Medicaid Services as critical access hospitals in accordance with the Code of Federal Regulations, Title 42, Volume 3, Part 485, Subpart F, §485.606(b), shall be exempted from the requirements in subparagraph (A)(i) - (iv) of this paragraph.

(C) The CNO shall be responsible for the operation of the services, including determining the types and numbers of nursing personnel and staff necessary to provide nursing care for all areas of the hospital.

(D) The CNO shall report directly to the individual who has authority to represent the hospital and who is responsible for the operation of the hospital according to the policies and procedures of the hospital's governing board.

(E) The CNO shall participate with leadership from the governing body, medical staff, and clinical areas, in planning, promoting and conducting performance improvement activities.

(2) Staffing and delivery of care.

(A) The nursing services shall adopt, implement and enforce a procedure to verify that hospital nursing personnel for whom licensure is required have valid and current licensure.

(B) There shall be adequate numbers of RNs, licensed vocational nurses (LVNs), and other personnel to provide nursing care to all patients as needed.

(C) There shall be supervisory and staff personnel for each department or nursing unit to provide, when needed, the immediate availability of an RN to provide care for any patient.

(D) An RN shall be on duty in each building of a licensed hospital that contains at least one nursing unit where patients are present. The RN shall supervise and evaluate the nursing care for each patient and assign the nursing care to other nursing personnel in accordance with the patient's needs and the specialized qualifications and competence of the nursing staff available.

(E) The nursing staff shall develop and keep current a nursing plan of care for each patient which addresses the patient's needs.

(F) The hospital shall establish a nurse staffing committee as a standing committee of the hospital. The committee shall be established in accordance with Health and Safety Code (HSC), §§161.031 - 161.033, to be responsible for soliciting and receiving input from nurses on the development, ongoing monitoring, and evaluation of the staffing plan. As provided by HSC, §161.032, the hospital's records and review relating to evaluation of these outcomes and indicators are confidential and not subject to disclosure under Government Code, Chapter 552 and not subject to disclosure, discovery, subpoena or other means of legal compulsion for their release. As used in this subsection, "committee" or "staffing committee" means a nurse staffing committee established under this subparagraph.

(i) The committee shall be composed of:

(I) at least 60% registered nurses who are involved in direct patient care at least 50% of their work time and selected by their peers who provide direct care during at least 50% of their work time;

(II) at least one representative from either infection control, quality assessment and performance improvement or risk management;

(III) members who are representative of the types of nursing services provided at the hospital; and

(IV) the chief nursing officer of the hospital who is a voting member.

(ii) Participation on the committee by a hospital employee as a committee member shall be part of the employee's work time and the hospital shall compensate that member for that time accordingly. The hospital shall relieve the committee member of other work duties during committee meetings.

(iii) The committee shall meet at least quarterly.

(iv) The responsibilities of the committee shall be to:

(I) develop and recommend to the hospital's governing body a nurse staffing plan that meets the requirements of subparagraph (G) of this paragraph;

(II) review, assess and respond to staffing concerns expressed to the committee;

(III) identify the nurse-sensitive outcome measures the committee will use to evaluate the effectiveness of the official nurse services staffing plan;

(IV) evaluate, at least semiannually, the effectiveness of the official nurse services staffing plan and variations between the plan and the actual staffing; and

(V) submit to the hospital's governing body, at least semiannually, a report on nurse staffing and patient care outcomes, including the committee's evaluation of the effectiveness of the official nurse services staffing plan and aggregate variations between the staffing plan and actual staffing.

(G) The hospital shall adopt, implement and enforce a written official nurse services staffing plan. As used in this subsection, "patient care unit" means a unit or area of a hospital in which registered nurses provide patient care.

(i) The official nurse services staffing plan and policies shall:

(I) require significant consideration to be given to the nurse staffing plan recommended by the hospital's nurse staffing committee and the committee's evaluation of any existing plan;

(II) be based on the needs of each patient care unit and shift and on evidence relating to patient care needs;

(III) require use of the official nurse services staffing plan as a component in setting the nurse staffing budget;

(IV) encourage nurses to provide input to the nurse staffing committee relating to nurse staffing concerns;

(V) protect from retaliation nurses who provide input to the nurse staffing committee; and

(VI) comply with subsection (o) of this section.

(ii) The plan shall:

(I) set minimum staffing levels for patient care units that are:

(-a-) based on multiple nurse and patient considerations including:

(-1-) patient characteristics and number of patients for whom care is being provided, including number of admissions, discharges and transfers on a unit;

(-2-) intensity of patient care being provided and variability of patient care across a nursing unit;

(-3-) scope of services provided;

(-4-) context within which care is provided, including architecture and geography of the environment, and the availability of technology; and

(-5-) nursing staff characteristics, including staff consistency and tenure, preparation and experience, and the number and competencies of clinical and non-clinical support staff the nurse must collaborate with or supervise.

(-b-) determined by the nursing assessment and in accordance with evidence-based safe nursing standards; and

(-c-) recalculated at least annually, or as necessary;

(II) include a method for adjusting the staffing plan shift to shift for each patient care unit based on factors, such as, the intensity of patient care to provide staffing flexibility to meet patient needs;

(III) include a contingency plan when patient care needs unexpectedly exceed direct patient care staff resources;

(IV) include how on-call time will be used;

(V) reflect current standards established by private accreditation organizations, governmental entities, national nursing professional associations, and other health professional organizations and should be developed based upon a review of the codes of ethics developed by the nursing profession through national nursing organizations;

(VI) include a mechanism for evaluating the effectiveness of the official nurse services staffing plan based on patient needs, nursing sensitive quality indicators, nurse satisfaction measures collected by the hospital and evidence based nurse staffing standards. At least one from each of the following three types of outcomes shall be correlated to the adequacy of staffing:

(-a-) nurse-sensitive patient outcomes selected by the nurse staffing committee, such as, patient falls, adverse drug events, injuries to patients, skin breakdown, pneumonia, infection rates, upper gastrointestinal bleeding, shock, cardiac arrest, length of stay, or patient readmissions;

(-b-) operational outcomes, such as, work-related injury or illness, vacancy and turnover rates, nursing care hours per patient day, on-call use, or overtime rates; and

(-c-) substantiated patient complaints related to staffing levels;

(VII) incorporate a process that facilitates the timely and effective identification of concerns about the adequacy of the staffing plan by the nurse staffing committee established pursuant to subparagraph (F) of this paragraph. This process shall include:

(-a-) a prohibition on retaliation for reporting concerns;

(-b-) a requirement that nurses report concerns timely through appropriate channels within the hospital;

(-c-) orientation of nurses on how to report concerns and to whom;

(-d-) encouraging nurses to provide input to the committee relating to nurse staffing concerns;

(-e-) review, assessment, and response by the committee to staffing concerns expressed to the committee;

(-f-) a process for providing feedback during the committee meeting on how concerns are addressed by the committee established under subparagraph (F) of this paragraph; and

(-g-) use of the nurse safe harbor peer review process pursuant to Occupations Code, §303.005;

(VIII) include policies and procedures that require:

(-a-) orientation of nurses and other personnel who provide nursing care to all patient care units to which they are assigned on either a temporary or permanent basis;

(-b-) that the orientation of nurses and other personnel and the competency to perform nursing services is documented in accordance with hospital policy;

(-c-) that nursing assignments be congruent with documented competency; and

(IX) be used by the hospital as a component in setting the nurse staffing budget and guiding the hospital in assigning nurses hospital wide.

(iii) The hospital shall make readily available to nurses on each patient care unit at the beginning of each shift the official nurse services staffing plan levels and current staffing levels for that unit and that shift.

(iv) There shall be a semiannual evaluation by the staffing committee of the effectiveness of the official nurse services staffing plan and variations between the staffing plan and actual staffing. The evaluation shall consider the outcomes and nursing-sensitive indicators as set out in clause (ii)(VI) of this subparagraph, patient needs, nurse satisfaction measures collected by the hospital, and evidence based nurse staffing standards. This evaluation shall be documented in the minutes of the committee established under subparagraph (F) of this paragraph and presented to the hospital's governing body. Hospitals may determine whether this evaluation is done on a unit or facility level basis. To assist the committee with the semiannual evaluation, the hospital shall report to the committee the variations between the staffing plan and actual staffing. This report of variations shall be confidential and not subject to disclosure under Government Code, Chapter 552 and not subject to disclosure, discovery, subpoena or other means of legal compulsion for their release.

(v) The staffing plan shall be retained for a period of two years.

(H) Nonemployee licensed nurses who are working in the hospital shall adhere to the policies and procedures of the hospital. The CNO shall provide for the adequate orientation, supervision, and evaluation of the clinical activities of nonemployee nursing personnel which occur within the responsibility of the nursing services.

(I) The hospital shall annually report to the department on:

(i) whether the hospital's governing body has adopted a nurse staffing policy;

(ii) whether the hospital has established a nurse staffing committee that meets the membership requirements of subparagraph (F) of this paragraph;

(iii) whether the nurse staffing committee has evaluated the hospital's official nurse services staffing plan and has reported the results of the evaluation to the hospital's governing body; and

(iv) the nurse-sensitive outcome measures the committee adopted for use in evaluating the hospital's official nurse services staffing plan.

(3) Mandatory overtime. The hospital shall adopt, implement and enforce policies on use of mandatory overtime.

(A) As used in this subsection:

(i) "on-call time" means time spent by a nurse who is not working but who is compensated for availability; and

(ii) "mandatory overtime" means a requirement that a nurse work hours or days that are in addition to the hours or days scheduled, regardless of the length of a scheduled shift or the number of scheduled shifts each week. Mandatory overtime does not include prescheduled on-call time or time immediately before or after a scheduled shift necessary to document or communicate patient status to ensure patient safety.

(B) A hospital may not require a nurse to work mandatory overtime, and a nurse may refuse to work mandatory overtime.

(C) This section does not prohibit a nurse from volunteering to work overtime.

(D) A hospital may not use on-call time as a substitute for mandatory overtime.

(E) The prohibitions on mandatory overtime do not apply if:

(i) a health care disaster, such as a natural or other type of disaster that increases the need for health care personnel, unexpectedly affects the county in which the nurse is employed or affects a contiguous county;

(ii) a federal, state, or county declaration of emergency is in effect in the county in which the nurse is employed or is in effect in a contiguous county;

(iii) there is an emergency or unforeseen event of a kind that:

(I) does not regularly occur;

(II) increases the need for health care personnel at the hospital to provide safe patient care; and

(III) could not prudently be anticipated by the hospital; or

(iv) the nurse is actively engaged in an ongoing medical or surgical procedure and the continued presence of the nurse through the completion of the procedure is necessary to ensure the health and safety of the patient. The nurse staffing committee shall ensure that scheduling a nurse for a procedure that could be anticipated to require the nurse to stay beyond the end of his or her scheduled shift does not constitute mandatory overtime.

(F) If a hospital determines that an exception exists under subparagraph (E) of this paragraph, the hospital shall, to the extent possible, make and document a good faith effort to meet the staffing need through voluntary overtime, including calling per diems and agency nurses, assigning floats, or requesting an additional day of work from off-duty employees.

(G) A hospital may not suspend, terminate, or otherwise discipline or discriminate against a nurse who refuses to work mandatory overtime.

(4) Drugs and biologicals. Drugs and biologicals shall be prepared and administered in accordance with federal and state laws,

the orders of the individuals granted privileges by the medical staff, and accepted standards of practice.

(A) All drugs and biologicals shall be administered by, or under supervision of, nursing or other personnel in accordance with federal and state laws and regulations, including applicable licensing rules, and in accordance with the approved medical staff policies and procedures.

(B) All orders for drugs and biologicals shall be in writing, dated, timed, and signed by the individual responsible for the care of the patient as specified under subsection (f)(6)(A) of this section. When telephone or verbal orders must be used, they shall be:

(i) accepted only by personnel who are authorized to do so by the medical staff policies and procedures, consistent with federal and state laws;

(ii) dated, timed, and authenticated within 48 hours by the prescriber or another practitioner who is responsible for the care of the patient and has been credentialed by the medical staff and granted privileges which are consistent with the written orders; and

(iii) used infrequently.

(C) There shall be a hospital procedure for immediately reporting transfusion reactions, adverse drug reactions, and errors in administration of drugs to the attending physician and, if appropriate, to the hospital-wide quality assessment and performance improvement program.

(5) Blood transfusions.

(A) Transfusions shall be prescribed in accordance with hospital policy and administered in accordance with a written protocol for the administration of blood and blood components and the use of infusion devices and ancillary equipment.

(B) Personnel administering blood transfusions and intravenous medications shall have special training for this duty according to written, adopted, implemented and enforced hospital policy.

(C) Blood and blood components shall be transfused through a sterile, pyrogen-free transfusion set that has a filter designed to retain particles potentially harmful to the recipient.

(D) The patient must be observed during the transfusion and for an appropriate time thereafter for suspected adverse reactions.

(E) Pretransfusion and posttransfusion vital signs shall be recorded.

(F) When warming of blood is indicated, this shall be accomplished during its passage through the transfusion set. The warming system shall be equipped with a visible thermometer and may have an audible warning system. Blood shall not be warmed above 42 degrees Celsius.

(G) Drugs or medications, including those intended for intravenous use, shall not be added to blood or blood components. A 0.9% sodium chloride injection, United States Pharmacopeia, may be added to blood or blood components. Other solutions intended for intravenous use may be used in an administration set or added to blood or blood components under either of the following conditions:

(i) they have been approved for this use by the Federal Drug Administration; or

(ii) there is documentation available to show that addition to the component involved is safe and efficacious.

(H) There shall be a system for detection, reporting and evaluation of suspected complications of transfusion. Any adverse event experienced by a patient in association with a transfusion is to be regarded as a suspected transfusion complication. In the event of a suspected transfusion complication, the personnel attending the patient shall notify immediately a responsible physician and the transfusion service and document the complication in the patient's medical record. All suspected transfusion complications shall be evaluated promptly according to an established procedure.

(I) Following the transfusion, the blood transfusion record or a copy shall be made a part of the patient's medical record.

(6) Reporting and peer review of a vocational or registered nurse. A hospital shall adopt, implement, and enforce a policy to ensure that the hospital complies with the Occupations Code §§301.401 - 301.403, 301.405 and Chapter 303 (relating to Grounds for Reporting Nurse, Duty of Nurse to Report, Duty of Peer Review Committee to Report, Duty of Person Employing Nurse to Report, and Nursing Peer Review respectively), and with the rules adopted by the Board of Nurse Examiners in 22 TAC §217.16 (relating to Minor Incidents), §217.19 (relating to Incident-Based Nursing Peer Review and Whistleblower Protections), and §217.20 (relating to Safe Harbor Peer Review for Nurses and Whistleblower Protections).

(7) Policies and procedures related to workplace safety.

(A) The hospital shall adopt, implement and enforce policies and procedures related to the work environment for nurses which:

(i) improve workplace safety and reduce the risk of injury, occupational illness, and violence; and

(ii) increase the use of ergonomic principles and ergonomically designed devices to reduce injury and fatigue.

(B) The policies and procedures adopted under subparagraph (A) of this paragraph, at a minimum, must include:

(i) evaluating new products and technology that incorporate ergonomic principles;

(ii) educating nurses in the application of ergonomic practices;

(iii) conducting workplace audits to identify areas of risk of injury, occupational illness, or violence and recommending ways to reduce those risks;

(iv) controlling access to those areas identified as having a high risk of violence; and

(v) promptly reporting crimes committed against nurses to appropriate law enforcement agencies.

(8) Safe patient handling and movement practices.

(A) The hospital shall adopt, implement and enforce policies and procedures to identify, assess, and develop strategies to control risk of injury to patients and nurses associated with the lifting, transferring, repositioning, or movement of a patient.

(B) The policies and procedures shall establish a process that, at a minimum, includes the following:

(i) analysis of the risk of injury to both patients and nurses posed by the patient handling needs of the patient populations served by the hospital and the physical environment in which patient handling and movement occurs;

(ii) education of nurses in the identification, assessment, and control of risks of injury to patients and nurses during patient handling;

(iii) evaluation of alternative ways to reduce risks associated with patient handling, including evaluation of equipment and the environment;

(iv) restriction, to the extent feasible with existing equipment and aids, of manual patient handling or movement of all or most of a patient's weight to emergency, life-threatening, or otherwise exceptional circumstances;

(v) collaboration with and annual report to the nurse staffing committee;

(vi) procedures for nurses to refuse to perform or be involved in patient handling or movement that the nurse believes in good faith will expose a patient or a nurse to an unacceptable risk of injury;

(vii) submission of an annual report to the governing body on activities related to the identification, assessment, and development of strategies to control risk of injury to patients and nurses associated with the lifting, transferring, repositioning, or movement of a patient; and

(viii) development of architectural plans for constructing or remodeling a hospital or a unit of a hospital in which patient handling and movement occurs, with consideration of the feasibility of incorporating patient handling equipment or the physical space and construction design needed to incorporate that equipment at a later date.

(p) Outpatient services. If the hospital provides outpatient services, the services shall meet the needs of the patients in accordance with acceptable standards of practice.

(1) Organization. Outpatient services shall be appropriately organized and integrated with inpatient services.

(2) Personnel.

(A) The hospital shall assign an individual to be responsible for outpatient services.

(B) The hospital shall have appropriate physicians on staff and other professional and nonprofessional personnel available.

(q) Pharmacy services. The hospital shall provide pharmaceutical services that meet the needs of the patients.

(1) Compliance. The hospital shall provide a pharmacy which is licensed, as required, by the Texas State Board of Pharmacy. Pharmacy services shall comply with all applicable statutes and rules.

(2) Organization. The hospital shall have a pharmacy directed by a licensed pharmacist.

(3) Medical staff. The medical staff shall be responsible for developing policies and procedures that minimize drug errors. This function may be delegated to the hospital's organized pharmaceutical services.

(4) Pharmacy management and administration. The pharmacy or drug storage area shall be administered in accordance with accepted professional principles.

(A) Standards of practice as defined by state law shall be followed regarding the provision of pharmacy services.

(B) The pharmaceutical services shall have an adequate number of personnel to ensure quality pharmaceutical services including emergency services.

(i) The staff shall be sufficient in number and training to respond to the pharmaceutical needs of the patient population being served. There shall be an arrangement for emergency services.

(ii) Employees shall provide pharmaceutical services within the scope of their license and education.

(C) Drugs and biologicals shall be properly stored to ensure ventilation, light, security, and temperature controls.

(D) Records shall have sufficient detail to follow the flow of drugs from entry through dispensation.

(E) There shall be adequate controls over all drugs and medications including the floor stock. Drug storage areas shall be approved by the pharmacist, and floor stock lists shall be established.

(F) Inspections of drug storage areas shall be conducted throughout the hospital under pharmacist supervision.

(G) There shall be a drug recall procedure.

(H) A full-time, part-time, or consulting pharmacist shall be responsible for developing, supervising, and coordinating all the activities of the pharmacy services.

(i) Direction of pharmaceutical services may not require on-premises supervision but may be accomplished through regularly scheduled visits in accordance with state law.

(ii) A job description or other written agreement shall clearly define the responsibilities of the pharmacist.

(I) Current and accurate records shall be kept of the receipt and disposition of all scheduled drugs.

(i) There shall be a record system in place that provides the information on controlled substances in a readily retrievable manner which is separate from the patient record.

(ii) Records shall trace the movement of scheduled drugs throughout the services, documenting utilization or wastage.

(iii) The pharmacist shall be responsible for determining that all drug records are in order and that an account of all scheduled drugs is maintained and reconciled with written orders.

(5) Delivery of services. In order to provide patient safety, drugs and biologicals shall be controlled and distributed in accordance with applicable standards of practice, consistent with federal and state laws.

(A) All compounding, packaging, and dispensing of drugs and biologicals shall be under the supervision of a pharmacist and performed consistent with federal and state laws.

(B) All drugs and biologicals shall be kept in a secure area, and locked when appropriate.

(i) A policy shall be adopted, implemented, and enforced to ensure the safeguarding, transferring, and availability of keys to the locked storage area.

(ii) Drugs listed in Schedules II, III, IV, and V of the Comprehensive Drug Abuse Prevention and Control Act of 1970 shall be kept locked within a secure area.

(C) Outdated, mislabeled, or otherwise unusable drugs and biologicals shall not be available for patient use.

(D) When a pharmacist is not available, drugs and biologicals shall be removed from the pharmacy or storage area only by personnel designated in the policies of the medical staff and pharmaceutical service, in accordance with federal and state laws.

(i) There shall be a current list of individuals identified by name and qualifications who are designated to remove drugs from the pharmacy.

(ii) Only amounts sufficient for immediate therapeutic needs shall be removed.

(E) Drugs and biologicals not specifically prescribed as to time or number of doses shall automatically be stopped after a reasonable time that is predetermined by the medical staff.

(i) Stop order policies and procedures shall be consistent with those of the nursing staff and the medical staff rules and regulations.

(ii) A protocol shall be established by the medical staff for the implementation of the stop order policy, in order that drugs shall be reviewed and renewed, or automatically stopped.

(iii) A system shall be in place to determine compliance with the stop order policy.

(F) Drug administration errors, adverse drug reactions, and incompatibilities shall be immediately reported to the attending physician and, if appropriate, to the hospital-wide quality assessment and performance improvement program. There shall be a mechanism in place for capturing, reviewing, and tracking medication errors and adverse drug reactions.

(G) Abuses and losses of controlled substances shall be reported, in accordance with applicable federal and state laws, to the individual responsible for the pharmaceutical services, and to the chief executive officer, as appropriate.

(H) Information relating to drug interactions and information on drug therapy, side effects, toxicology, dosage, indications for use, and routes of administration shall be immediately available to the professional staff.

(i) A pharmacist shall be readily accessible by telephone or other means to discuss drug therapy, interactions, side effects, dosage, assist in drug selection, and assist in the identification of drug induced problems.

(ii) There shall be staff development programs on drug therapy available to facility staff to cover such topics as new drugs added to the formulary, how to resolve drug therapy problems, and other general information as the need arises.

(I) A formulary system shall be established by the medical staff to ensure quality pharmaceuticals at reasonable costs.

(r) Quality assessment and performance improvement. The governing body shall ensure that there is an effective, ongoing, hospital-wide, data-driven quality assessment and performance improvement (QAPI) program to evaluate the provision of patient care.

(1) Program scope. The hospital-wide QAPI program shall reflect the complexity of the hospital's organization and services and have a written plan of implementation. The program must include an ongoing program that shows measurable improvements in the indicators for which there is evidence that they will improve health outcomes, and identify and reduce medical errors.

(A) All hospital departments and services, including services furnished under contract or arrangement shall be evaluated.

(B) Health care associated infections shall be evaluated.

(C) Medication therapy shall be evaluated.

(D) All medical and surgical services performed in the hospital shall be evaluated as they relate to appropriateness of diagnosis and treatment.

(E) The program must measure, analyze and track quality indicators, including adverse patients' events, and other aspects of performance that assess processes of care, hospital services and operations.

(F) Data collected must be used to monitor the effectiveness and safety of service and quality of care, and to identify opportunities for changes that will lead to improvement.

(G) Priorities must be established for performance improvement activities that focus on high-risk, high-volume, or problem-prone areas, taking into consideration the incidence, prevalence and severity of problems in those areas, and how health outcomes and quality of care may be affected.

(H) Performance improvement activities which affect patient safety, including analysis of medical errors and adverse patient events, must be established, and preventive actions implemented.

(I) Success of actions implemented as a result of performance improvement activities must be measured, and ongoing performance must be tracked to ensure improvements are sustained.

(2) Responsibility and accountability. The hospital's governing body, medical staff and administrative staff are responsible and accountable for ensuring that:

(A) an ongoing program for quality improvement is defined, implemented and maintained, and that program requirements are met;

(B) an ongoing program for patient safety, including reduction of medical errors, is defined, implemented and maintained;

(C) the hospital-wide QAPI efforts address priorities for improved quality of care and patient safety, and that all improvement actions are evaluated; and

(D) adequate resources are allocated for measuring, assessing, improving and sustaining the hospital's resources, and for reducing risk to patients.

(3) Medically-related patient care services. The hospital shall have an ongoing plan, consistent with available community and hospital resources, to provide or make available social work, psychological, and educational services to meet the medically-related needs of its patients. The hospital also shall have an effective, ongoing discharge planning program that facilitates the provision of follow-up care.

(A) Discharge planning shall be completed prior to discharge.

(B) Patients, along with necessary medical information, shall be transferred or referred to appropriate facilities, agencies, or outpatient services, as needed for follow-up or ancillary care.

(4) Implementation. The hospital must take actions aimed at performance improvement and, after implementing those actions, the hospital must measure its success, and track performance to ensure that improvements are sustained.

(s) Radiology services. The hospital shall maintain, or have available, diagnostic radiologic services according to needs of the patients. All radiology equipment, including X-ray equipment, mammography equipment and laser equipment, shall be licensed and registered as required under Chapter 289 of this title (relating to Radiation Control). If therapeutic services are also provided, the services, as well as the diagnostic services, shall meet professionally approved stan-

dards for safety and personnel qualifications as required in §§289.227, 289.229, 289.230 and 289.231 of this title (relating to Registration Regulations). In a special hospital, portable X-ray equipment may be acceptable as a minimum requirement.

(1) Policies and procedures. Policies and procedures shall be adopted, implemented and enforced which will describe the radiology services provided in the hospital and how employee and patient safety will be maintained.

(2) Safety for patients and personnel. The radiology services, particularly ionizing radiology procedures, shall minimize hazards to patients and personnel.

(A) Proper safety precautions shall be maintained against radiation hazards. This includes adequate radiation shielding, safety procedures and equipment maintenance and testing.

(B) Inspection of equipment shall be made by or under the supervision of a licensed medical physicist in accordance with §289.227(o) of this title (relating to Use of Radiation Machines in the Healing Arts). Defective equipment shall be promptly repaired or replaced.

(C) Radiation workers shall be provided personnel monitoring dosimeters to measure the amount of radiation exposure they receive. Exposure reports and documentation shall be available for review.

(D) Radiology services shall be provided only on the order of individuals granted privileges by the medical staff.

(3) Personnel.

(A) A qualified full-time, part-time, or consulting radiologist shall supervise the ionizing radiology services and shall interpret only those radiology tests that are determined by the medical staff to require a radiologist's specialized knowledge. For purposes of this section a radiologist is a physician who is qualified by education and experience in radiology in accordance with medical staff bylaws.

(B) Only personnel designated as qualified by the medical staff shall use the radiology equipment and administer procedures.

(4) Records. Records of radiology services shall be maintained. The radiologist or other individuals who have been granted privileges to perform radiology services shall sign reports of his or her interpretations.

(t) Renal dialysis services.

(1) Hospitals may provide inpatient dialysis services without an additional license under HSC Chapter 251. Hospitals providing outpatient dialysis services shall be licensed under HSC Chapter 251.

(2) Hospitals may provide outpatient dialysis services when the governor or the president of the United States declares a disaster in this state or another state. The hospital may provide outpatient dialysis only during the term of the disaster declaration.

(3) Equipment.

(A) Maintenance and repair. All equipment used by a facility, including backup equipment, shall be operated within manufacturer's specifications, and maintained free of defects which could be a potential hazard to patients, staff, or visitors. Maintenance and repair of all equipment shall be performed by qualified staff or contract personnel.

(i) Staff shall be able to identify malfunctioning equipment and report such equipment to the appropriate staff for immediate repair.

(ii) Medical equipment that malfunctions must be clearly labeled and immediately removed from service until the malfunction is identified and corrected.

(iii) Written evidence of all maintenance and repairs shall be maintained.

(iv) After repairs or alterations are made to any equipment or system, the equipment or system shall be thoroughly tested for proper operation before returning to service. This testing must be documented.

(v) A facility shall comply with the federal Food, Drug, and Cosmetic Act, 21 United States Code (USC), §360i(b), concerning reporting when a medical device as defined in 21 USC §321(h) has or may have caused or contributed to the injury or death of a patient of the facility.

(B) Preventive maintenance. A facility shall develop, implement and enforce a written preventive maintenance program to ensure patient care related equipment used in a facility receives electrical safety inspections, if appropriate, and maintenance at least annually or more frequently as recommended by the manufacturer. The preventive maintenance may be provided by facility staff or by contract.

(C) Backup machine. At least one complete dialysis machine shall be available on site as backup for every ten dialysis machines in use. At least one of these backup machines must be completely operational during hours of treatment. Machines not in use during a patient shift may be counted as backup except at the time of an initial or an expansion survey.

(D) Pediatric patients. If pediatric patients are treated, a facility shall use equipment and supplies, to include blood pressure cuffs, dialyzers, and blood tubing, appropriate for this special population.

(E) Emergency equipment and supplies. A facility shall have emergency equipment and supplies immediately accessible in the treatment area.

(i) At a minimum, the emergency equipment and supplies shall include the following:

(I) oxygen;

(II) mechanical ventilatory assistance equipment, to include airways, manual breathing bag, and mask;

(III) suction equipment;

(IV) supplies specified by the medical director;

(V) electrocardiograph; and

(VI) automated external defibrillator or defibrillator.

(ii) If pediatric patients are treated, the facility shall have the appropriate type and size emergency equipment and supplies listed in clause (i) of this subparagraph for this special population.

(iii) A facility shall establish, implement, and enforce a policy for the periodic testing and maintenance of the emergency equipment. Staff shall properly maintain and test the emergency equipment and supplies and document the testing and maintenance.

(F) Transducer protector. A transducer protector shall be replaced when wetted during a dialysis treatment and shall be used for one treatment only.

(4) Water treatment and dialysate concentrates.

(A) Compliance required. A facility shall meet the requirements of this section. A facility may follow more stringent requirements than the minimum standards required by this section.

(i) The facility administrator and medical director shall each demonstrate responsibility for the water treatment and dialysate supply systems to protect hemodialysis patients from adverse effects arising from known chemical and microbial contaminates that may be found in improperly prepared dialysate, to ensure that the dialysate is correctly formulated and meets the requirements of all applicable quality standards.

(ii) The facility administrator and medical director must assure that policies and procedures related to water treatment and dialysate are understandable and accessible to the operator(s) and that the training program includes quality testing, risks and hazards of improperly prepared concentrate and bacterial issues.

(iii) The facility administrator and medical director must be informed prior to any alteration of, or any device being added to, the water system.

(B) Water treatment. These requirements apply to water intended for use in the delivery of hemodialysis, including the preparation of concentrates from powder at a dialysis facility and dialysate.

(i) The design for the water treatment system in a facility shall be based on considerations of the source water for the facility and designed by a water quality professional with education, training, or experience in dialysis system design.

(ii) When a public water system supply is not used by a facility, the source water shall be tested by the facility at monthly intervals in the same manner as a public water system as described in 30 TAC, §290.104 (relating to Summary of Maximum Contaminant Levels, Maximum Residual Disinfectant Levels, Treatment Techniques, and Action Levels), and §290.109 (relating to Microbial Contaminants) as adopted by the Texas Commission on Environmental Quality (TCEQ).

(iii) The physical space in which the water treatment system is located must be adequate to allow for maintenance, testing, and repair of equipment. If mixing of dialysate is performed in the same area, the physical space must also be adequate to house and allow for the maintenance, testing, and repair of the mixing equipment and for performing the mixing procedure.

(iv) The water treatment system components shall be arranged and maintained so that bacterial and chemical contaminant levels in the product water do not exceed the standards for hemodialysis water quality described in §4.2.1 (concerning Water Bacteriology) and §4.2.2 (concerning Maximum Level of Chemical Contaminants) of the American National Standard, Water Treatment Equipment for Hemodialysis Applications, August 2001 Edition, published by the Association for the Advancement of Medical Instrumentation (AAMI). All documents published by the AAMI as referenced in this section may be obtained by writing the following address: 1110 North Glebe Road, Suite 220, Arlington, Virginia 22201.

(v) Written policies and procedures for the operation of the water treatment system must be developed and implemented. Parameters for the operation of each component of the water treatment system must be developed in writing and known to the operator. Each major water system component shall be labeled in a manner that identifies the device; describes its function, how performance is verified and actions to take in the event performance is not within an acceptable range.

(vi) The materials of any components of water treatment systems (including piping, storage, filters and distribution systems) that contact the purified water shall not interact chemically or physically so as to affect the purity or quality of the product water adversely. Such components shall be fabricated from unreactive materials (e.g. plastics) or appropriate stainless steel. The use of materials that are known to cause toxicity in hemodialysis, such as copper, brass, galvanized material, or aluminum, is prohibited.

(vii) Chemicals infused into the water such as iodine, acid, flocculants, and complexing agents shall be shown to be nondialyzable or shall be adequately removed from product water. Monitors or specific test procedures to verify removal of additives shall be provided and documented.

(viii) Each water treatment system shall include reverse osmosis membranes or deionization tanks and a minimum of two carbon tanks in series. If the source water is from a private supply which does not use chlorine/chloramine, the water treatment system shall include reverse osmosis membranes or deionization tanks and a minimum of one carbon tank.

(I) Reverse osmosis membranes. Reverse osmosis membranes, if used, shall meet the standards in §4.3.7 (concerning Reverse Osmosis) of the American National Standard, Water Treatment Equipment for Hemodialysis Applications, August 2001 Edition, published by the AAMI.

(II) Deionization systems.

(-a-) Deionization systems, if used, shall be monitored continuously to produce water of one megohm-centimeter (cm) or greater specific resistivity (or conductivity of one microsiemen/cm or less) at 25 degrees Celsius. An audible and visual alarm shall be activated when the product water resistivity falls below this level and the product water stream shall be prevented from reaching any point of use.

(-b-) Patients shall not be dialyzed on deionized water with a resistivity less than 1.0 megohm-cm measured at the output of the deionizer.

(-c-) A minimum of two deionization (DI) tanks in series shall be used with resistivity monitors including audible and visual alarms placed pre and post the final DI tank in the system. The alarms must be audible in the patient care area.

(-d-) Feed water for deionization systems shall be pretreated with activated carbon adsorption, or a comparable alternative, to prevent nitrosamine formation.

(-e-) If a deionization system is the last process in a water treatment system, it shall be followed by an ultrafilter or other bacteria and endotoxin reducing device.

(III) Carbon tanks.

(-a-) The carbon tanks must contain acid washed carbon, 30-mesh or smaller with a minimum iodine number of 900.

(-b-) A minimum of two carbon adsorption beds shall be installed in a series configuration.

(-c-) The total empty bed contact time (EBCT) shall be at least ten minutes, with the final tank providing at least five minutes EBCT. Carbon adsorption systems used to prepare water for portable dialysis systems are exempt from the requirement for the second carbon and a ten minute EBCT if removal of chloramines to below 0.1 milligram (mg)/1 is verified before each treatment.

(-d-) A means shall be provided to sample the product water immediately prior to the final bed(s). Water from this port(s) must be tested for chlorine/chloramine levels immediately prior to each patient shift.

(-e-) All samples for chlorine/chloramine testing must be drawn when the water treatment system has been operating for at least 15 minutes.

(-f-) Tests for total chlorine, which include both free and combined forms of chlorine, may be used as a single analysis with the maximum allowable concentration of 0.1 mg/liter (L). Test results of greater than 0.5 parts per million (ppm) for chlorine or 0.1 ppm for chloramine from the port between the initial tank(s) and final tank(s) shall require testing to be performed at the final exit and replacement of the initial tank(s).

(-g-) In a system without a holding tank, if test results at the exit of the final tank(s) are greater than the parameters for chlorine or chloramine described in this subclause, dialysis treatment shall be immediately terminated to protect patients from exposure to chlorine/chloramine and the medical director shall be notified. In systems with holding tanks, if the holding tank tests <0.1 mg/L for total chlorine, the reverse osmosis (RO) may be turned off and the product water in the holding tank may be used to finish treatments in process. The medical director shall be notified.

(-h-) If means other than granulated carbon are used to remove chlorine/chloramine, the facility's governing body must approve such use in writing after review of the safety of the intended method for use in hemodialysis applications. If such methods include the use of additives, there must be evidence the product water does not contain unsafe levels of these additives.

(ix) Water softeners, if used, shall be tested at the end of the treatment day to verify their capacity to treat a sufficient volume of water to supply the facility for the entire treatment day and shall be fitted with a mechanism to prevent water containing the high concentrations of sodium chloride used during regeneration from entering the product water line during regeneration.

(x) If used, the face(s) of timer(s) used to control any component of the water treatment or dialysate delivery system shall be visible to the operator at all times. Written evidence that timers are checked for operation and accuracy each day of operation must be maintained.

(xi) Filter housings, if used during disinfectant procedures, shall include a means to clear the lower portion of the housing of the disinfecting agents. Filter housings shall be opaque.

(xii) Ultrafilters, or other bacterial reducing filters, if used, shall be fitted with pressure gauges on the inlet and outlet water lines to monitor the pressure drop across the membrane. Ultrafilters shall be included in routine disinfection procedures.

(xiii) If used, storage tanks shall have a conical or bowl shaped base and shall drain from the lowest point of the base. Storage tanks shall have a tight-fitting lid and be vented through a hydrophobic 0.2 micron air filter. Means shall be provided to effectively disinfect any storage tank installed in a water distribution system.

(xiv) Ultraviolet (UV) lights, if used, shall be monitored at the frequency recommended by the manufacturer. A log sheet shall be used to record monitoring.

(xv) Water treatment system piping shall be labeled to indicate the contents of the pipe and direction of flow.

(xvi) The water treatment system must be continuously monitored during patient treatment and be guarded by audible and visual alarms which can be seen and heard in the dialysis treatment area should water quality drop below specific parameters. Quality monitor sensing cells shall be located as the last component of the water treatment system and at the beginning of the distribution system. No water treatment components that could affect the quality of the product water as measured by this device shall be located after the sensing cell.

(xvii) When deionization tanks do not follow a reverse osmosis system, parameters for the rejection rate of the membranes must assure that the lowest rate accepted would provide product water in compliance with §4.2.2 (concerning Maximum Level of Chemical Contaminants) of the American National Standard, Water Treatment Equipment for Hemodialysis Applications, August 2001 Edition published by the AAMI.

(xviii) A facility shall maintain written logs of the operation of the water treatment system for each treatment day. The log book shall include each component's operating parameter and the action taken when a component is not within the facility's set parameters.

(xix) Microbiological testing of product water shall be conducted.

(I) Frequency. Microbiological testing shall be conducted monthly and following any repair or change to the water treatment system. For a newly installed water distribution system, or when a change has been made to an existing system, weekly testing shall be conducted for one month to verify that bacteria and endotoxin levels are consistently within the allowed limits.

(II) Sample sites. At a minimum, sample sites chosen for the testing shall include the beginning of the distribution piping, at any site of dialysate mixing, and the end of the distribution piping.

(III) Technique. Samples shall be collected immediately before sanitization/disinfection of the water treatment system and dialysis machines. Water testing results shall be routinely trended and reviewed by the medical director in order to determine if results seem questionable or if there is an opportunity for improvement. The medical director shall determine if there is a need for retesting. Repeated results of "no growth" shall be validated via an outside laboratory. A calibrated loop may not be used in microbiological testing of water samples. Colonies shall be counted using a magnifying device.

(IV) Expected results. Product water used to prepare dialysate, concentrates from powder, or to reprocess dialyzers for multiple use, shall contain a total viable microbial count less than 200 colony forming units (CFU)/millimeter (ml) and an endotoxin concentration less than 2 endotoxin units (EU)/ml. The action level for the total viable microbial count in the product water shall be 50 CFU/ml and the action level for the endotoxin concentration shall be 1 EU/ml.

(V) Required action for unacceptable results. If the action levels described at subclause (IV) of this clause are observed in the product water, corrective measures shall be taken promptly to reduce the levels into an acceptable range.

(VI) Records. All bacteria and endotoxin results shall be recorded on a log sheet in order to identify trends that may indicate the need for corrective action.

(xx) If ozone generators are used to disinfect any portion of the water or dialysate delivery system, testing based on the manufacturer's direction shall be used to measure the ozone concentration each time disinfection is performed, to include testing for safe levels of residual ozone at the end of the disinfection cycle. Testing for ozone in the ambient air shall be conducted on a periodic basis as recommended by the manufacturer. Records of all testing must be maintained in a log.

(xxi) If used, hot water disinfection systems shall be monitored for temperature and time of exposure to hot water as speci-

fied by the manufacturer. Temperature of the water shall be recorded at a point furthest from the water heater, where the lowest water temperature is likely to occur. The water temperature shall be measured each time a disinfection cycle is performed. A record that verifies successful completion of the heat disinfection shall be maintained.

(xxii) After chemical disinfection, means shall be provided to restore the equipment and the system in which it is installed to a safe condition relative to residual disinfectant prior to the product water being used for dialysis applications.

(xxiii) Samples of product water must be submitted for chemical analysis every six months and must demonstrate that the quality of the product water used to prepare dialysate or concentrates from powder, meets §4.2.2 (concerning Maximum Level of Chemical Contaminants) of the American National Standard, Water Treatment Equipment for Hemodialysis Applications, August 2001 Edition, published by the AAMI.

(I) Samples for chemical analysis shall be collected at the end of the water treatment components and at the most distal point in each water distribution loop, if applicable. All other outlets from the distribution loops shall be inspected to ensure that the outlets are fabricated from compatible materials. Appropriate containers and pH adjustments shall be used to ensure accurate determinations. New facilities or facilities that add or change the configuration of the water distribution system must draw samples at the most distal point for each water distribution loop, if applicable, on a one time basis.

(II) Additional chemical analysis shall be submitted if substantial changes are made to the water treatment system or if the percent rejection of a reverse osmosis system decreased 5.0% or more from the percent rejection measured at the time the water sample for the preceding chemical analysis was taken.

(xxiv) Facility records must include all test results and evidence that the medical director has reviewed the results of the water quality testing and directed corrective action when indicated.

(xxv) Only persons qualified by the education or experience may operate, repair, or replace components of the water treatment system.

(C) Dialysate.

(i) Quality control procedures shall be established to ensure ongoing conformance to policies and procedures regarding dialysate quality.

(ii) Each facility shall set all hemodialysis machines to use only one family of concentrates. When new machines are put into service or the concentrate family or concentrate manufacturer is changed, samples shall be sent to a laboratory for verification.

(iii) Prior to each patient treatment, staff shall verify the dialysate conductivity and pH of each machine with an independent device.

(iv) Bacteriological testing shall be conducted.

(I) Frequency. Responsible facility staff shall develop a schedule to ensure each hemodialysis machine is tested quarterly for bacterial growth and the presence of endotoxins. Hemodialysis machines of home patients shall be cultured monthly until results not exceeding 200 CFU/ml are obtained for three consecutive months, then quarterly samples shall be cultured.

(II) Acceptable limits. Dialysate shall contain less than 200 CFU/ml and an endotoxin concentration of less than 2 EU/ml. The action level for total viable microbial count shall be 50 CFU/ml and the action level for endotoxin concentration shall be 1 EU/ml.

(III) Action to be taken. Disinfection and retesting shall be done when bacterial or endotoxin counts exceed the action levels. Additional samples shall be collected when there is a clinical indication of a pyrogenic reaction and/or septicemia.

(v) Only a licensed nurse may use an additive to increase concentrations of specific electrolytes in the acid concentrate. Mixing procedures shall be followed as specified by the additive manufacturer. When additives are prescribed for a specific patient, the container holding the prescribed acid concentrate shall be labeled with the name of the patient, the final concentration of the added electrolyte, the date the prescribed concentrate was made, and the name of the person who mixed the additive.

(vi) All components used in concentrate preparation systems (including mixing and storage tanks, pumps, valves and piping) shall be fabricated from materials (e.g., plastics or appropriate stainless steel) that do not interact chemically or physically with the concentrate so as to affect its purity, or with the germicides used to disinfect the equipment. The use of materials that are known to cause toxicity in hemodialysis such as copper, brass, galvanized material and aluminum is prohibited.

(vii) Facility policies shall address means to protect stored acid concentrates from tampering or from degeneration due to exposure to extreme heat or cold.

(viii) Procedures to control the transfer of acid concentrates from the delivery container to the storage tank and prevent the inadvertent mixing of different concentrate formulations shall be developed, implemented and enforced. The storage tanks shall be clearly labeled.

(ix) Concentrate mixing systems shall include a purified water source, a suitable drain, and a ground fault protected electrical outlet.

(I) Operators of mixing systems shall use personal protective equipment as specified by the manufacturer during all mixing processes.

(II) The manufacturer's instructions for use of a concentrate mixing system shall be followed, including instructions for mixing the powder with the correct amount of water. The number of bags or weight of powder added shall be determined and recorded.

(III) The mixing tank shall be clearly labeled to indicate the fill and final volumes required to correctly dilute the powder.

(IV) Systems for preparing either bicarbonate or acid concentrate from powder shall be monitored according to the manufacturer's instructions.

(V) Concentrates shall not be used, or transferred to holding tanks or distribution systems, until all tests are completed.

(VI) If a facility designs its own system for mixing concentrates, procedures shall be developed and validated using an independent laboratory to ensure proper mixing.

(x) Acid concentrate mixing tanks shall be designed to allow the inside of the tank to be rinsed when changing concentrate formulas.

(I) Acid mixing systems shall be designed and maintained to prevent rust and corrosion.

(II) Acid concentrate mixing tanks shall be emptied completely and rinsed with product water before mixing another batch of concentrate to prevent cross contamination between different batches.

(III) Acid concentrate mixing equipment shall be disinfected as specified by the equipment manufacturer or in the case where no specifications are given, as defined by facility policy.

(IV) Records of disinfection and rinsing of disinfectants to safe residual levels shall be maintained.

(xi) Bicarbonate concentrate mixing tanks shall have conical or bowl shaped bottoms and shall drain from the lowest point of the base. The tank design shall allow all internal surfaces to be disinfected and rinsed.

(I) Bicarbonate concentrate mixing tanks shall not be prefilled the night before use.

(II) If disinfectant remains in the mixing tank overnight, this solution must be completely drained, the tank rinsed and tested for residual disinfectant prior to preparing the first batch of that day of bicarbonate concentrate.

(III) Unused portions of bicarbonate concentrate shall not be mixed with fresh concentrate.

(IV) At a minimum, bicarbonate distribution systems shall be disinfected weekly. More frequent disinfection shall be done if required by the manufacturer, or if dialysate culture results are above the action level.

(V) If jugs are reused to deliver bicarbonate concentrate to individual hemodialysis machines:

(-a-) jugs shall be emptied of concentrate, rinsed and inverted to drain at the end of each treatment day;

(-b-) at a minimum, jugs shall be disinfected weekly, more frequent disinfection shall be considered by the medical director if dialysate culture results are above the action level; and

(-c-) following disinfection, jugs shall be drained, rinsed free of residual disinfectant, and inverted to dry. Testing for residual disinfectant shall be done and documented.

(xii) All mixing tanks, bulk storage tanks, dispensing tanks and containers for single hemodialysis treatments shall be labeled as to the contents.

(I) Mixing tanks. Prior to batch preparation, a label shall be affixed to the mixing tank that includes the date of preparation and the chemical composition or formulation of the concentrate being prepared. This labeling shall remain on the mixing tank until the tank has been emptied.

(II) Bulk storage/dispensing tanks. These tanks shall be permanently labeled to identify the chemical composition or formulation of their contents.

(III) Single machine containers. At a minimum, single machine containers shall be labeled with sufficient information to differentiate the contents from other concentrate formulations used in the facility and permit positive identification by users of container contents.

(xiii) Permanent records of batches produced shall be maintained to include the concentrate formula produced, the volume of the batch, lot number(s) of powdered concentrate packages, the manufacturer of the powdered concentrate, date and time of mixing, test results, person performing mixing, and expiration date (if applicable).

(xiv) If dialysate concentrates are prepared in the facility, the manufacturers' recommendations shall be followed regarding any preventive maintenance. Records shall be maintained indicating the date, time, person performing the procedure, and the results (if applicable).

(5) Prevention requirements concerning patients.

(A) Hepatitis B vaccination.

(i) With the advice and consent of a patient's attending nephrologist, facility staff shall make the hepatitis B vaccine available to a patient who is susceptible to hepatitis B, provided that the patient has coverage or is willing to pay for vaccination.

(ii) The facility shall make available to patients literature describing the risks and benefits of the hepatitis B vaccination.

(B) Serologic screening of patients.

(i) A patient new to dialysis shall have been screened for hepatitis B surface antigen (HBsAg) within one month before or at the time of admission to the facility or have a known hepatitis B surface antibody (anti-HBs) status of at least 10 milli-international units per milliliter no more than 12 months prior to admission. The facility shall document how this screening requirement is met.

(ii) Repeated serologic screening shall be based on the antigen or antibody status of the patient.

(I) Monthly screening for HBsAg is required for patients whose previous test results are negative for HBsAg.

(II) Screening of HBsAg-positive or anti-HBs-positive patients may be performed on a less frequent basis, provided that the facility's policy on this subject remains congruent with Appendices i and ii of the National Surveillance of Dialysis Associated Disease in the United States, 2000, published by the United States Department of Health and Human Services.

(C) Isolation procedures for the HBsAg-positive patient.

(i) The facility shall treat patients positive for HBsAg in a segregated treatment area which includes a hand washing sink, a work area, patient care supplies and equipment, and sufficient space to prevent cross-contamination to other patients.

(ii) A patient who tests positive for HBsAg shall be dialyzed on equipment reserved and maintained for the HBsAg-positive patient's use only.

(iii) When a caregiver is assigned to both HBsAg-negative and HBsAg-positive patients, the HBsAg-negative patients assigned to this grouping must be Hepatitis B antibody positive. Hepatitis B antibody positive patients are to be seated at the treatment stations nearest the isolation station and be assigned to the same staff member who is caring for the HBsAg-positive patient.

(iv) If an HBsAg-positive patient is discharged, the equipment which had been reserved for that patient shall be given intermediate level disinfection prior to use for a patient testing negative for HBsAg.

(v) In the case of patients new to dialysis, if these patients are admitted for treatment before results of HBsAg or anti-HBs testing are known, these patients shall undergo treatment as if the HBsAg test results were potentially positive, except that they shall not be treated in the HBsAg isolation room, area, or machine.

(I) The facility shall treat potentially HBsAg-positive patients in a location in the treatment area which is outside of traffic patterns until the HBsAg test results are known.

(II) The dialysis machine used by this patient shall be given intermediate level disinfection prior to its use by another patient.

(III) The facility shall obtain HBsAg status results of the patient no later than three days from admission.

(u) Respiratory care services. The hospital shall meet the needs of the patients in accordance with acceptable standards of practice.

(1) Policies and procedures shall be adopted, implemented, and enforced which describe the provision of respiratory care services in the hospital.

(2) The organization of the respiratory care services shall be appropriate to the scope and complexity of the services offered.

(3) There shall be a medical director or clinical director of respiratory care services who is a physician with the knowledge, experience, and capabilities to supervise and administer the services properly. The medical director or clinical director may serve on either a full-time or part-time basis.

(4) There shall be adequate numbers of respiratory therapists, respiratory therapy technicians, and other personnel who meet the qualifications specified by the medical staff, consistent with the state law.

(5) Personnel qualified to perform specific procedures and the amount of supervision required for personnel to carry out specific procedures shall be designated in writing.

(6) If blood gases or other clinical laboratory tests are performed by the respiratory care services staff, the respiratory care staff shall comply with CLIA 1988 in accordance with the requirements specified in 42 CFR, Part 493.

(7) Services shall be provided only on, and in accordance with, the orders of a physician.

(v) Sterilization and sterile supplies.

(1) Supervision. The sterilization of all supplies and equipment shall be under the supervision of a person qualified by education, training and experience. Staff responsible for the sterilization of supplies and equipment shall participate in a documented continuing education program; new employees shall receive initial orientation and on-the-job training.

(2) Equipment and procedures.

(A) Sterilization. Every hospital shall provide equipment adequate for sterilization of supplies and equipment as needed. Equipment shall be maintained and operated to perform, with accuracy, the sterilization of the various materials required.

(B) Written policy. Written policies and procedures for the decontamination and sterilization activities performed shall be adopted, implemented and enforced. Policies shall include the receiving, cleaning, decontaminating, disinfecting, preparing and sterilization of reusable items, as well as those for the assembly, wrapping, storage, distribution and quality control of sterile items and equipment. These written policies shall be reviewed at least every other year and approved by the infection control practitioner or committee.

(C) Separation. Where cleaning, preparation, and sterilization functions are performed in the same room or unit, the physical facilities, equipment, and the policies and procedures for their use, shall be such as to effectively separate soiled or contaminated supplies and equipment from the clean or sterilized supplies and equipment. Hand washing facilities shall be provided and a separate sink shall be provided for safe disposal of liquid waste.

(D) Labeling. All containers for solutions, drugs, flammable solvents, ether, alcohol, and medicated supplies shall be clearly labeled to indicate contents. Those which are sterilized by the hospital shall be labeled so as to be identifiable both before and after sterilization. Sterilized items shall have a load control identification that indicates the sterilizer used, the cycle or load number, and the date of sterilization.

(E) Preparation for sterilization.

(i) All items to be sterilized shall be prepared to reduce the bioburden. All items shall be thoroughly cleaned, decontaminated and prepared in a clean, controlled environment.

(ii) All articles to be sterilized shall be arranged so all surfaces will be directly exposed to the sterilizing agent for the prescribed time and temperature.

(F) Packaging. All wrapped articles to be sterilized shall be packaged in materials recommended for the specific type of sterilizer and material to be sterilized.

(G) External chemical indicators.

(i) External chemical indicators, also known as sterilization process indicators, shall be used on each package to be sterilized, including items being flash sterilized to indicate that items have been exposed to the sterilization process.

(ii) The indicator results shall be interpreted according to manufacturer's written instructions and indicator reaction specifications.

(iii) A log shall be maintained with the load identification, indicator results, and identification of the contents of the load.

(H) Biological indicators. Biological indicators are commercially-available microorganisms (e.g., United States Food and Drug Administration (FDA) approved strips or vials of Bacillus species endospores) which can be used to verify the performance of waste treatment equipment and processes (or sterilization equipment and processes).

(i) The efficacy of the sterilizing process shall be monitored with reliable biological indicators appropriate for the type of sterilizer used.

(ii) Biological indicators shall be included in at least one run each week of use for steam sterilizers, at least one run each day of use for low-temperature hydrogen peroxide gas sterilizers, and every load for ethylene oxide (EO) sterilizers.

(iii) Biological indicators shall be included in every load that contains implantable objects.

(iv) A log shall be maintained with the load identification, biological indicator results, and identification of the contents of the load.

(v) If a test is positive, the sterilizer shall immediately be taken out of service.

(I) Implantable items shall be recalled and reprocessed if a biological indicator test (spore test) is positive.

(II) All available items shall be recalled and reprocessed if a sterilizer malfunction is found and a list of those items not retrieved in the recall shall be submitted to infection control.

(III) A malfunctioning sterilizer shall not be put back into use until it has been serviced and successfully tested according to the manufacturer's recommendations.

(I) Sterilizers.

(i) Steam sterilizers (saturated steam under pressure) shall be utilized for sterilization of heat and moisture stable items. Steam sterilizers shall be used according to manufacturer's written instructions.

(ii) EO sterilizers shall be used for processing heat and moisture sensitive items. EO sterilizers and aerators shall be used and vented according to the manufacturer's written instructions.

(iii) Flash sterilizers shall be used for emergency sterilization of clean, unwrapped instruments and porous items only.

(J) Disinfection.

(i) Written policies, approved by the infection control committee, shall be adopted, implemented and enforced for the use of chemical disinfectants.

(ii) The manufacturer's written instructions for the use of disinfectants shall be followed.

(iii) An expiration date, determined according to manufacturer's written recommendations, shall be marked on the container of disinfection solution currently in use.

(iv) Disinfectant solutions shall be kept covered and used in well-ventilated areas.

(v) Chemical germicides that are registered with the United States Environmental Protection Agency as "sterilants" may be used either for sterilization or high-level disinfection.

(vi) All staff personnel using chemical disinfectants shall have received training on their use.

(K) Performance records.

(i) Performance records for all sterilizers shall be maintained for each cycle. These records shall be retained and available for review for a minimum of five years.

(ii) Each sterilizer shall be monitored continuously during operation for pressure, temperature, and time at desired temperature and pressure. A record shall be maintained and shall include:

(I) the sterilizer identification;

(II) sterilization date;

(III) cycle number;

(IV) contents of each load;

(V) duration and temperature of exposure phase (if not provided on sterilizer recording charts);

(VI) identification of operator(s);

(VII) results of biological tests and dates performed;

(VIII) time-temperature recording charts from each sterilizer;

(IX) gas concentration and relative humidity (if applicable); and

(X) any other test results.

(L) Storage of sterilized items.

(i) Sterilized items shall be transported so as to maintain cleanliness and sterility and to prevent physical damage.

(ii) Sterilized items shall be stored in well-ventilated, limited access areas with controlled temperature and humidity.

(iii) The hospital shall adopt, implement and enforce a policy which describes the mechanism used to determine the shelf life of sterilized packages.

(M) Preventive maintenance. Preventive maintenance of all sterilizers shall be performed according to individual adopted, implemented and enforced policy on a scheduled basis by qualified personnel, using the sterilizer manufacturer's service manual as a reference. A preventive maintenance record shall be maintained for each sterilizer. These records shall be retained at least two years and shall be available for review.

(w) Surgical services. If a hospital provides surgical services, the services shall be well-organized and provided in accordance with acceptable standards of practice. If outpatient surgical services are offered, the services shall be consistent in quality with inpatient care in accordance with the complexity of services offered. A special hospital may not offer surgical services.

(1) Organization and staffing. The organization of the surgical services shall be appropriate for the scope of the services offered.

(A) The operating rooms shall be supervised by an experienced RN or physician.

(B) Licensed vocational nurses (LVNs) and surgical technologists (operating room technicians) may serve as scrub nurses or technologists under the supervision of an RN.

(C) Circulating duties in the operating room must be performed by qualified RNs. In accordance with approved medical staff polices and procedures, LVNs and surgical technologists may assist in circulatory duties under the direct supervision of a qualified RN circulator.

(D) Surgical privileges shall be delineated for all physicians, podiatrists, and dentists performing surgery in accordance with the competencies of each. The surgical services shall maintain a roster specifying the surgical privileges of each.

(E) If the facility employs surgical technologists, the facility shall adopt, implement, and enforce policies and procedures to comply with Health and Safety Code, Chapter 259 (relating to Surgical Technologists at Health Care Facilities).

(2) Delivery of service. Surgical services shall be consistent with needs and resources. Written policies governing surgical care which are designed to ensure the achievement and maintenance of high standards of medical practice and patient care shall be adopted, implemented and enforced.

(A) There shall be a complete medical history and physical examination, as required under subsection (k)(3)(F) of this section, in the medical record of every patient prior to surgery, except in emergencies. If this has been dictated, but not yet recorded in the patient's medical record, there shall be a statement to that effect and an admission note in the record by the individual who admitted the patient.

(B) A properly executed informed consent form for the operation shall be in the patient's medical record before surgery, except in emergencies.

(C) The following equipment shall be available in the operating room suites:

(i) communication system;

(ii) cardiac monitor;

(iii) resuscitator;

(iv) defibrillator;

(v) aspirator; and

(vi) tracheotomy set.

(D) There shall be adequate provisions for immediate postoperative care.

(E) The operating room register shall be complete and up-to-date. The register shall contain, but not be limited to, the following:

(i) patient's name and hospital identification number;

(ii) date of operation;

(iii) operation performed;

(iv) operating surgeon and assistant(s);

(v) type of anesthesia used and name of person administering it;

(vi) time operation began and ended;

(vii) time anesthesia began and ended;

(viii) disposition of specimens;

(ix) names of scrub and circulating personnel;

(x) unusual occurrences; and

(xi) disposition of the patient.

(F) An operative report describing techniques, findings, and tissue removed or altered shall be written or dictated immediately following surgery and signed by the surgeon.

(x) Therapy services. If the hospital provides physical therapy, occupational therapy, audiology, or speech pathology services, the services shall be organized and staffed to ensure the health and safety of patients.

(1) Organization and staffing. The organization of the services shall be appropriate to the scope of the services offered.

(A) The director of the services shall have the necessary knowledge, experience, and capabilities to properly supervise and administer the services.

(B) Physical therapy, occupational therapy, speech therapy, or audiology services, if provided, shall be provided by staff who meet the qualifications specified by the medical staff, consistent with state law.

(2) Delivery of services. Services shall be furnished in accordance with a written plan of treatment. Services to be provided shall be consistent with applicable state laws and regulations, and in accordance with orders of the physician, podiatrist, dentist or other licensed practitioner who is authorized by the medical staff to order the services. Therapy orders shall be incorporated in the patient's medical record.

(y) Waste and waste disposal.

(1) Special waste and liquid/sewage waste management.

(A) The hospital shall comply with the requirements set forth by the department in §§1.131 - 1.137 of this title (relating to Definition, Treatment, and Disposition of Special Waste from Health Care-Related Facilities) and the TCEQ requirements in 30 TAC §330.1207 (relating to Generators of Medical Waste).

(B) All sewage and liquid wastes shall be disposed of in a municipal sewerage system or a septic tank system permitted by the TCEQ in accordance with 30 TAC Chapter 285 (relating to On-Site Sewage Facilities).

(2) Waste receptacles.

(A) Waste receptacles shall be conveniently available in all toilet rooms, patient areas, staff work areas, and waiting rooms. Receptacles shall be routinely emptied of their contents at a central location(s) into closed containers.

(B) Waste receptacles shall be properly cleaned with soap and hot water, followed by treatment of inside surfaces of the receptacles with a germicidal agent.

(C) All containers for other municipal solid waste shall be leak-resistant, have tight-fitting covers, and be rodent-proof.

(D) Nonreusable containers shall be of suitable strength to minimize animal scavenging or rupture during collection operations.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 19, 2010.

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Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: December 9, 2010
Proposal publication date: July 2, 2010
For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER I. PHYSICAL PLANT AND CONSTRUCTION REQUIREMENTS

25 TAC §133.163

STATUTORY AUTHORITY

The amendment is authorized by Health and Safety Code, §241.026, concerning rules and minimum standards for the licensing and regulation of general hospitals; Health and Safety Code, Chapter 98, concerning the reporting the of health-care-associated infections; Health and Safety Code, Chapter 257, relating to nurse staffing, and Chapter 258, relating to mandatory overtime for nurses prohibited; Health and Safety Code, Chapter 259, concerning the surgical technologists at health care facilities; Health and Safety Code, Chapter 323, which requires hospitals to provide forensic medical examinations for certain sexual assault victims; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 134. PRIVATE PSYCHIATRIC HOSPITALS AND CRISIS STABILIZATION UNITS

SUBCHAPTER C. OPERATIONAL REQUIREMENTS

25 TAC §134.41

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts an amendment to §134.41, concerning the regulation of psychiatric hospitals and crisis stabilization units, with changes to the proposed text as published in the July 9, 2010, issue of the *Texas Register* (35 TexReg 6027).

BACKGROUND AND PURPOSE

The amendment is necessary to comply with legislation passed during the 81st Legislature, Regular Session, 2009. Senate Bill (SB) 476 added Health and Safety Code, Chapter 257, relating to nurse staffing, and Chapter 258, relating to mandatory overtime for nurses prohibited. The legislation requires psychiatric hospitals and crisis stabilization units to comply with nurse staffing requirements; establish a nurse staffing committee; report the nurse staffing information to the department; and adopt, implement, and enforce policies on use of mandatory overtime.

The department regulates psychiatric hospitals and crisis stabilization units as required by Health and Safety Code, Chapter 577.

SECTION-BY-SECTION SUMMARY

An amendment to §134.41(c)(8) and (j)(1) - (3) requires the governing body of a psychiatric hospital to adopt, implement, and enforce a written nurse staffing policy; requires psychiatric hospitals to create a nurse staffing committee as a standing committee, establishes committee membership, requires the committee to meet at least quarterly, and defines responsibilities of the committee; requires a nurse services staffing plan and policies; requires annual reporting to the department on the nurse staffing policy, nurse staffing plan, nurse staffing committee, and nurse sensitive outcome measures used in the nurse staffing plan.

An amendment to §134.41(j)(4) requires the adoption, implementation, and enforcement of policies on use of mandatory overtime; prohibits psychiatric hospitals from requiring a nurse to work mandatory overtime or using on-call time as a substitute for mandatory overtime; provides exceptions to the mandatory overtime prohibition in certain situations, including disasters or emergencies, and requires the psychiatric hospital to make and document a good faith effort to meet staffing needs through other measures; and requires that a psychiatric hospital may not suspend, terminate, discipline, or discriminate against a nurse who refuses to work mandatory overtime.

COMMENTS

The department, on behalf of the commission, has reviewed and prepared responses to the comments received regarding the proposed rules during the comment period, which the commission has reviewed and accepts. Comments were received from two associations, Texas Hospital Association, and Texas Nursing Association. The commenters were not against the rule in its entirety; however, the commenters suggested recommendations for change as discussed in the summary of comments.

Comment: Concerning §134.41(j), two commenters requested adding requirements for an organized nursing service, education qualifications for the chief nursing officer, general requirements for nurse staffing and nursing care, and requirements for reporting of staffing concerns to the nurse staffing committee, and requirements for nursing orientation and documentation of competency.

Response: The commission agrees that changes are needed, but disagrees with adding the requested requirements at this time, as there has been insufficient stakeholder input for changes of this magnitude. Chapter 134 is scheduled to undergo a full agency review. At that time, this comment will be reviewed.

Comment: Concerning §134.41(j)(2)(B)(ii), two commenters requested that the nurse staffing plan address "time off for nurses who have worked extended hours within a certain period of time at that facility."

Response: The commission disagrees with adding this requirement. Members of the nurse staffing committee are selected by their peers, and the committee is comprised of at least 60% registered nurses involved in direct patient care. This selection of committee members ensures that the nurses' scheduling needs are met and that nurses have an active voice in the scheduling process. A requirement was added to §134.41(c)(8)(C) for the governing body of a facility to adopt, implement, and enforce a policy to "ensure that all nursing assignments consider client safety and are commensurate with the nurse's educational preparation, experience, knowledge, and physical and emotional ability."

Comment: Concerning on-call time for nurses, two commenters requested the nurse staffing plan address how on-call time will be used at the facility.

Response: The commission agrees, and has added the phrase, "include how on-call time will be used;" to §134.41(j)(2)(B)(iv).

Comment: Concerning §134.41(j)(4), two commenters requested the addition of a new subparagraph with the words, "Work time being permitted mandatory overtime under this paragraph does not relieve nurses of their duty not to accept assignments not commensurate with the nurse's physical and emotional ability, e.g., because overly fatigued."

Response: The commission disagrees, as this addresses individual nurse practice and is not under the jurisdiction of the department. No change was made to the rule as a result of this comment.

Comment: Concerning §134.41(j)(4)(A)(ii), mandatory overtime for nurses, two commenters requested amending the definition of mandatory overtime to include the words, "for the purposes of determining mandatory overtime, work time includes hospital-required attendance at in-service, continuing education, and meetings." The commenters stated that adding this language would be consistent with federal law.

Response: The commission disagrees, as the addition is not required. Section 134.1(c) states that "compliance with this chapter does not constitute release from the requirements of other applicable federal, state, or local laws, codes, rules, regulations and ordinances." No change was made to the rule as a result of this comment.

Comment: Concerning §134.41(j)(4)(E)(iv), two commenters requested replacing the words, "scheduling nurses for procedures that could be anticipated to require the nurse to stay beyond the end of their scheduled shift constitutes mandatory overtime and shall be prohibited," with "adding elective procedures to the established schedule that require the nurse to stay involuntarily beyond the end of the nurse's scheduled shift constitutes prohibited mandatory overtime."

Response: The commission disagrees with adding the suggested sentence, but agrees that a change is needed. The commission has replaced the statement, "scheduling nurses for procedures that could be anticipated to require the nurse to stay beyond the end of their scheduled shift constitutes mandatory overtime and shall be prohibited" with the statement, "the nurse staffing committee shall ensure that scheduling a nurse for a procedure that could be anticipated to require the nurse to stay beyond the end of his or her scheduled shift does not constitute mandatory overtime." This statement requires each psychiatric hospital, through the nurses and other staff on the nurse staffing committee, to address the issue of scheduling nurses for procedures and mandatory overtime.

The following changes clarify the rule.

Concerning §134.41(j)(4)(A)(ii), in the definition of mandatory overtime, the last sentence, "In determining whether work is mandatory overtime, prescheduled on-call time or time immediately before or after a scheduled shift necessary to document or communicate patient status to ensure patient safety is not included." was replaced with the sentence, "Mandatory overtime does not include prescheduled on-call time or time immediately before or after a scheduled shift necessary to document or communicate patient status to ensure patient safety."

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The amendment is authorized by Health and Safety Code, Chapters 257 and 258, concerning nurse staffing and mandatory overtime in a hospital; Health and Safety Code, §577.010, concerning rules and standards for the licensing and regulation of privatemental hospitals and mental health facilities required to be licensed under Chapter 577; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

§134.41. Facility Functions and Services.

(a) Anesthesia services. If the hospital furnishes anesthesia services, these services shall be provided in a well-organized manner under the direction of a qualified physician. The anesthesia service is responsible for all anesthesia administered in the hospital.

(1) Organization and staffing. The organization of anesthesia services shall be appropriate to the scope of the services offered. Anesthesia shall be administered only by:

(A) a qualified anesthesiologist;

(B) a physician (other than an anesthesiologist);

(C) a dentist, oral surgeon, or podiatrist who is qualified to administer anesthesia under state law; or

(D) a certified registered nurse anesthetist who is under the supervision, as set forth in the Medical Practice Act, Texas Occupations Code, Title 3, Subtitle B, and the Nursing Practice Act, Texas Occupations Code, Chapter 301, of the operating physician or of an anesthesiologist who is immediately available if needed.

(2) Delivery of services. Anesthesia services shall be consistent with needs and resources. Policies on anesthesia procedures shall include the delineation of pre-anesthesia and post-anesthesia responsibilities. The policies shall ensure that the following are provided for each patient.

(A) A pre-anesthesia evaluation by an individual qualified to administer anesthesia under paragraph (1) of this subsection shall be performed within 48 hours prior to the procedure.

(B) An intraoperative anesthesia record shall be provided. The record shall include any complications or problems occurring during the anesthesia including time, description of symptoms, review of affected systems, and treatments rendered. The record shall correlate with the controlled substance administration record.

(C) A post-anesthesia follow-up report shall be written by the person administering the anesthesia before transferring the patient from the recovery room and shall include evaluation for recovery from anesthesia, level of activity, respiration, blood pressure, level of consciousness, and patient color.

(i) With respect to inpatients, a post-anesthesia evaluation for proper anesthesia recovery shall be performed after transfer from recovery and within 48 hours after the procedure by the person administering the anesthesia, registered nurse (RN), or physician in accordance with policies and procedures approved by the medical staff.

(ii) With respect to outpatients, immediately prior to discharge, a post-anesthesia evaluation for proper anesthesia recovery shall be performed by the person administering the anesthesia, RN, or physician in accordance with policies and procedures approved by the medical staff.

(b) Dietary services. The facility shall have organized dietary services that are directed and staffed by adequate qualified personnel. However, a facility that has a contract with an outside food management company or an arrangement with another facility may meet this requirement if the company or other facility has a dietitian who serves the facility on a full-time, part-time, or consultant basis, and if the company or other facility maintains at least the minimum requirements specified in this section, and provides for the frequent and systematic liaison with the facility medical staff for recommendations of dietetic policies affecting patient treatment. The facility shall ensure that there

are sufficient personnel to respond to the dietary needs of the patient population being served.

(1) Organization.

(A) A facility shall have an employee who is qualified by experience or training to serve as director of the food and dietetic service, and be responsible for the daily management of the dietary services. This employee shall be full-time in a hospital; the crisis stabilization unit employee does not have to be full-time.

(B) There shall be a qualified dietitian who works full-time, part-time, or on a consultant basis. If by consultation, such services shall occur at least once per month for not less than eight hours. The dietitian shall:

(i) be currently licensed under the laws of this state to use the titles of licensed dietitian or provisional licensed dietitian, or be a registered dietitian;

(ii) maintain standards for professional practice;

(iii) supervise the nutritional aspects of patient care;

(iv) make an assessment of the nutritional status and adequacy of nutritional regimen, as appropriate;

(v) provide diet counseling and teaching, as appropriate;

(vi) document nutritional status and pertinent information in patient medical records, as appropriate;

(vii) approve menus; and

(viii) approve menu substitutions.

(C) There shall be administrative and technical personnel competent in their respective duties. The administrative and technical personnel shall:

(i) participate in established departmental or facility training pertinent to assigned duties;

(ii) conform to food handling techniques in accordance with paragraph (2)(E)(vii) of this subsection;

(iii) adhere to clearly defined work schedules and assignment sheets; and

(iv) comply with position descriptions which are job specific.

(2) Director. The director shall:

(A) comply with a position description which is job specific;

(B) clearly delineate responsibility and authority;

(C) participate in conferences with administration and department heads;

(D) establish, implement, and enforce policies and procedures for the overall operational components of the department to include, but not be limited to:

(i) quality assurance;

(ii) frequency of meals served;

(iii) non-routine occurrences; and

(iv) identification of patient trays;

(E) maintain authority and responsibility for the following, but not be limited to:

(i) orientation and training;

(ii) performance evaluations;

(iii) work assignments;

(iv) supervision of work and food handling techniques;

(v) procurement of food, paper, chemical, and other supplies, to include implementation of first-in first-out rotation system for all food items;

(vi) menu planning; and

(vii) ensuring compliance with §§229.161 - 229.171 of this title (relating to Texas Food Establishments).

(3) Diets. Menus shall meet the needs of the patients.

(A) Therapeutic diets shall be prescribed by the physician(s) responsible for the care of the patients. The dietary department of the facility shall:

(i) establish procedures for the processing of therapeutic diets to include, but not be limited to:

(I) accurate patient identification;

(II) transcription from nursing to dietary services;

(III) diet planning by a dietitian;

(IV) regular review and updating of diet when necessary; and

(V) written and verbal instruction to patient and family. It shall be in the patient's primary language, if practicable, prior to discharge. What is or would have been practicable shall be determined by the facts and circumstances of each case;

(ii) ensure that therapeutic diets are planned in writing by a qualified dietitian;

(iii) ensure that menu substitutions are approved by a qualified dietitian;

(iv) document pertinent information about the patient's response to a therapeutic diet in the medical record; and

(v) evaluate therapeutic diets for nutritional adequacy.

(B) Nutritional needs shall be met in accordance with recognized dietary practices and in accordance with orders of the physician(s) responsible for the care of the patients. The following requirements shall be met.

(i) Menus shall provide a sufficient variety of foods served in adequate amounts at each meal according to the guidance provided in the Recommended Dietary Allowances, as published by the Food and Nutrition Board, National Academy of Sciences, National Research Council, Tenth edition, 1989, which may be obtained by writing the National Academy Press, 2101 Constitution Avenue, Box 285, Washington, D.C. 20055, telephone (888) 624-8373.

(ii) A maximum of 15 hours shall not be exceeded between the last meal of the day (i.e. supper) and the breakfast meal, unless a substantial snack is provided. The facility shall adopt, implement, and enforce a policy on the definition of "substantial" to meet each patient's varied nutritional needs.

(C) A current therapeutic diet manual approved by the dietitian and medical staff shall be readily available to all medical, nursing, and food service personnel. The therapeutic manual shall:

(i) be revised as needed, not to exceed 5 years;

(ii) be appropriate for the diets routinely ordered in the facility;

(iii) have standards in compliance with the RDA;

(iv) contain specific diets which are not in compliance with RDA; and

(v) be used as a guide for ordering and serving diets.

(c) Governing body.

(1) Legal responsibility. There shall be a governing body responsible for the organization, management, control, and operation of the facility, including appointment of the medical staff. For facilities owned and operated by an individual or by partners, the individual or partners shall be considered the governing body.

(2) Organization. The governing body shall be formally organized in accordance with a written constitution or bylaws which clearly set forth the organizational structure and responsibilities.

(3) Meeting records. Records of governing body meetings shall be maintained.

(4) Responsibilities relating to the medical staff. The governing body shall:

(A) ensure that the medical staff has current bylaws, rules, and regulations which are implemented and enforced;

(B) approve medical staff bylaws and other medical staff rules and regulations;

(C) determine, in accordance with state law and with the advice of the medical staff, which categories of practitioners are eligible candidates for appointment to the medical staff;

(D) ensure that criteria for selection include individual character, competence, training, experience, and judgment;

(E) ensure that under no circumstances is the accordance of staff membership or professional privileges in the facility dependent solely upon certification, fellowship or membership in a specialty body or society;

(F) ensure the process for considering applications for medical staff membership and privileges affords each candidate for appointment procedural due process;

(G) ensure in granting or refusing medical staff membership or privileges, the facility does not differentiate on the basis of the academic medical degree;

(H) ensure that equal recognition is given to training programs accredited by the Accreditation Council on Graduate Medical Education and by the American Osteopathic Association if graduate medical education is used as a standard or qualification for medical staff membership or privileges for a physician;

(I) ensure that equal recognition is given to certification programs approved by the American Board of Medical Specialties and the Bureau of Osteopathic Specialists if board certification is used as a standard or qualification for medical staff membership or privileges for a physician;

(J) ensure that the medical staff is accountable to the governing body for the quality of care provided to patients;

(K) ensure that a facility's credentials committee acts expeditiously and without unnecessary delay when a candidate for appointment submits a completed application, as defined by each hospital, for medical staff membership or privileges, in accordance with the following:

(i) The credentials committee shall take action on the completed application not later than the 90th day after the date on which the application is received;

(ii) The governing body shall take final action on the application for medical staff membership or privileges not later than the 60th day after the date on which the recommendation of the credentials committee is received; and

(iii) The facility must notify the applicant in writing of the facility's final action, including a reason for denial or restriction of privileges, not later than the 20th day after the date on which final action is taken;

(L) ensure the facility complies with the requirements for reporting to the Texas Medical Board the results and circumstances of any professional review action in accordance with the Medical Practice Act, Occupations Code, §160.002 and §160.003.

(5) Facility administration. The governing body shall appoint a chief executive officer or administrator who is responsible for managing the facility.

(6) Patient care. In accordance with facility policy, the governing body shall ensure that:

(A) every patient is under the care of a physician. This provision is not to be construed to limit the authority of a physician to delegate tasks to other qualified health care personnel to the extent recognized under state law;

(B) patients are admitted to the facility only by members of the medical staff who have been granted admitting privileges; and

(C) a physician is on duty or on-call at all times.

(7) Contracted services. The governing body shall be responsible for services furnished in the facility whether or not they are furnished directly or under contracts. The governing body shall ensure that a contractor of services (including one for shared services and joint ventures) furnishes services in a safe and effective manner that permits the facility to comply with all applicable rules and standards for contracted services.

(8) Nurse staffing. The governing body shall adopt, implement and enforce a written nurse staffing policy to ensure that an adequate number and skill mix of nurses are available to meet the level of patient care needed. The governing body policy shall require that hospital administration adopt, implement and enforce a nurse staffing plan and policies that:

(A) require significant consideration be given to the nurse staffing plan recommended by the hospital's nurse staffing committee and the committee's evaluation of any existing plan;

(B) are based on the needs of each patient care unit and shift and on evidence relating to patient care needs;

(C) ensure that all nursing assignments consider client safety, and are commensurate with the nurse's educational preparation, experience, knowledge, and physical and emotional ability;

(D) require use of the official nurse services staffing plan as a component in setting the nurse staffing budget;

(E) encourage nurses to provide input to the nurse staffing committee relating to nurse staffing concerns;

(F) protect from retaliation nurses who provide input to the nurse staffing committee; and

(G) comply with subsection (j) of this section.

(d) Infection control. The facility shall provide a sanitary environment to avoid sources and transmission of infections and communicable diseases. There shall be an active program for the prevention, control, and investigation of infections and communicable diseases.

(1) Organization and policies. A person shall be designated as infection control coordinator. The facility shall ensure that policies governing prevention, control and surveillance of infections and communicable diseases are developed, implemented and enforced.

(A) There shall be a system for identifying, reporting, investigating, and controlling nosocomial infections and communicable diseases between patients and personnel.

(B) The infection control coordinator shall maintain a log of all reportable diseases and nosocomial infections designated as epidemiologically significant according to the facility's infection control policies.

(C) There shall be a written policy for reporting all reportable diseases to the local health authority or the Infectious Disease Epidemiology and Surveillance Division, Department of State Health Services, Mail Code 2822, P.O. Box 149347, Austin, TX 78714-9347, in accordance with Chapter 97 of this title (relating to Communicable Diseases).

(2) Responsibilities of the chief executive officer (CEO), medical staff, and chief nursing officer (CNO). The CEO, the medical staff, and the CNO shall be responsible for the following.

(A) The facility-wide quality assurance program and training programs shall address problems identified by the infection control coordinator.

(B) Successful corrective action plans in affected problem areas shall be implemented.

(3) Universal precautions. The facility shall adopt, implement, and enforce a written policy to monitor compliance of the facility and its personnel and medical staff with universal precautions in accordance with Health and Safety Code, Chapter 85, Subchapter I (relating to the Prevention of Transmission of HIV and Hepatitis B Virus by Infected Health Care Workers).

(e) Laboratory services. The facility shall provide directly, or have available adequate laboratory services to meet the needs of its patients.

(1) Facility laboratory services. A facility that provides laboratory services shall comply with the Clinical Laboratory Improvement Amendments of 1988 (CLIA 1988), in accordance with the requirements specified in 42 Code of Federal Regulations (CFR), §§493.1 - 493.1780. CLIA 1988 applies to all facilities with laboratories that examine human specimens for the diagnosis, prevention, or treatment of any disease or impairment of, or the assessment of the health of, human beings.

(2) Contracted laboratory services. The facility shall ensure that all laboratory services provided to its patients through a contractual agreement are performed in a facility certified in the appropriate specialties and subspecialties of service in accordance with the requirements specified in 42 CFR Part 493 to comply with CLIA 1988.

(3) Adequacy of laboratory services. The facility shall ensure the following.

(A) Emergency laboratory services shall be available 24 hours a day.

(B) A written description of services provided shall be available to the medical staff.

(C) The laboratory shall make provision for proper receipt and reporting of tissue specimens.

(4) Chemical hygiene. A facility that provides laboratory services directly shall adopt, implement, and enforce written policies and procedures to manage, minimize, or eliminate the risks to laboratory personnel of exposure to potentially hazardous chemicals in the laboratory which may occur during the normal course of job performance.

(f) Linen and laundry services. The facility shall provide sufficient clean linen to ensure the comfort of the patient. The facility, whether it operates its own laundry or uses commercial service, shall ensure the following.

(1) Employees of a facility involved in transporting, processing, or otherwise handling clean or soiled linen shall be given initial and follow-up inservice training to ensure a safe product for patients and to safeguard employees in their work.

(2) Clean linen shall be handled, transported, and stored by methods that will ensure its cleanliness.

(3) All contaminated linen shall be placed and transported in bags or containers labeled or color-coded.

(4) Employees who have contact with contaminated linen shall wear gloves and other appropriate personal protective equipment.

(5) Contaminated linen shall be handled as little as possible and with minimum agitation. Contaminated linen shall not be sorted or rinsed in patient care areas.

(6) All contaminated linen shall be bagged or put into carts at the location where it was used.

(A) Bags containing contaminated linen shall be closed prior to transport to the laundry.

(B) Whenever contaminated linen is wet and presents a reasonable likelihood of soak-through of or leakage from the bag or container, the linen shall be deposited and transported in bags that prevent leakage of fluids to the exterior.

(C) All linen placed in chutes shall be bagged.

(D) If chutes are not used to convey linen to a central receiving or sorting room, then adequate space shall be allocated on the various nursing units for holding the bagged contaminated linen.

(7) Linen shall be processed as follows:

(A) If hot water is used, linen shall be washed with detergent in water with a temperature of at least 71 degrees Centigrade (160 degrees Fahrenheit) for 25 minutes. Hot water requirements specified in Table 5 of §134.131(e) of this title (relating to Tables) shall be met.

(B) If low temperature (less than or equal to 70 degrees Centigrade) (158 degrees Fahrenheit) laundry cycles are used, chemicals suitable for low-temperature washing at proper use concentration shall be used.

(C) Commercial dry cleaning of fabrics soiled with blood also renders these items free of the risk of pathogen transmission.

(8) Flammable liquids shall not be used in the laundry.

(g) Medical record services. The facility shall have a medical record service that has administrative responsibility for medical records. A medical record shall be maintained for every individual who presents to the hospital for evaluation or treatment.

(1) The organization of the medical record service shall be appropriate to the scope and complexity of the services performed. The facility shall employ adequate personnel to ensure prompt completion, filing, and retrieval of records.

(2) The facility shall have a system of coding and indexing medical records. The system shall allow for timely retrieval by diagnosis and procedure, in order to support medical care evaluation studies.

(3) The facility shall adopt, implement, and enforce a policy to ensure that the facility complies with Health and Safety Code, §576.005 (relating to Confidentiality of Records) and Chapter 611, (relating to Mental Health Records).

(4) The medical record shall contain information to justify admission and continued hospitalization, support the diagnosis, and describe the patient's progress and response to medications and services. Medical records shall be accurately written, promptly completed, properly filed and retained, and accessible.

(5) The facility shall use a system of author identification and record maintenance that ensures the integrity of the authentication and protects the security of all entries to the records.

(A) The author of each entry shall be identified and shall authenticate his or her entry.

(B) Authentication shall include signatures, written initials, or computer entry.

(C) Use of signature stamps by physicians may be allowed in facilities when the signature stamp is authorized by the individual whose signature the stamp represents. The administrative offices of the facility shall have on file a signed statement to the effect that he or she is the only one who has the stamp and uses it. Delegation of use to another individual shall not be acceptable.

(D) A list of computer codes and written signatures shall be readily available and shall be maintained under adequate safeguards.

(E) Signatures by facsimile shall be acceptable. If received on a thermal machine, the facsimile document shall be copied onto regular paper.

(6) Medical records (reports and printouts) shall be retained by the facility in their original or legally reproduced form for a period of at least ten years. Films, scans, and other image records shall be retained for a period of at least five years. For retention purposes, medical records that shall be preserved for ten years include:

(A) identification data;

(B) the medical history of the patient;

(C) evidence of a physical examination and psychiatric evaluation;

(D) admitting diagnosis;

(E) diagnostic and therapeutic orders;

(F) properly executed informed consent forms for procedures and treatments specified by the medical staff, or by federal or state laws if applicable, to require written patient consent;

(G) treatment plans;

(H) clinical observations, including the results of therapy and treatment, all orders, nursing notes, medication records, vital signs, and other information necessary to monitor the patient's condition;

(I) reports of procedures, tests, and their results, including laboratory, pathology, and radiology reports;

(J) results of all consultative evaluations of the patient and appropriate findings by clinical and other staff involved in the care of the patient;

(K) discharge summary with outcome of hospitalization, disposition of care, and provisions for follow-up care; and

(L) final diagnosis with completion of medical records within 30 calendar days following discharge.

(7) If a patient was less than 18 years of age at the time he was last treated, the facility may authorize the disposal of those medical records relating to the patient on or after the date of his 20th birthday or on or after the 10th anniversary of the date on which he was last treated, whichever date is later.

(8) The facility shall not destroy medical records that relate to any matter that is involved in litigation if the facility knows the litigation has not been finally resolved.

(9) If a licensed facility should close, the facility shall notify the department at the time of closure the disposition of the medical records, including the location of where the medical records will be stored and the identity and telephone number of the custodian of the records.

(h) Medical staff.

(1) The medical staff shall be composed of physicians and may also be composed of podiatrists, dentists and other practitioners appointed by the governing body.

(A) The medical staff shall periodically conduct appraisals of its members according to medical staff bylaws.

(B) The medical staff shall examine credentials of candidates for medical staff membership and make recommendations to the governing body on the appointment of the candidate.

(2) The medical staff shall be well-organized and accountable to the governing body for the quality of the medical care provided to patients.

(A) The medical staff shall be organized in a manner approved by the governing body.

(B) If the medical staff has an executive committee, a majority of the members of the committee shall be doctors of medicine or osteopathy.

(C) Records of medical staff meetings shall be maintained.

(D) The responsibility for organization and conduct of the medical staff shall be assigned only to an individual physician.

(E) Each medical staff member shall sign a statement signifying they will abide by medical staff and hospital policies.

(3) The medical staff shall adopt, implement, and enforce bylaws, rules, and regulations to carry out its responsibilities. The bylaws shall:

(A) be approved by the governing body;

(B) include a statement of the duties and privileges of each category of medical staff (e.g., active, courtesy, consultant);

(C) describe the organization of the medical staff;

(D) describe the qualifications to be met by a candidate in order for the medical staff to recommend that the candidate be appointed by the governing body; and

(E) include criteria for determining the privileges to be granted and a procedure for applying the criteria to individuals requesting privileges.

(i) Mobile, transportable, and relocatable units. If the facility provides diagnostic procedures or treatments in mobile, transportable, or relocatable units, the facility shall adopt, implement and enforce procedures which address the potential emergency needs for those inpatients who are taken to mobile units on the facility premises for diagnostic procedures or treatment.

(j) Nurse staffing.

(1) The hospital shall establish a nurse staffing committee as a standing committee of the hospital. As used in this subsection, "committee" or "staffing committee" means a nurse staffing committee established under this paragraph.

(A) The committee shall be composed of:

(i) at least 60% registered nurses who are involved in direct patient care at least 50% of their work time and selected by their peers who provide direct care during at least 50% of their work time;

(ii) members who are representative of the types of nursing services provided at the hospital; and

(iii) the chief nursing officer of the hospital who is a voting member.

(B) Participation on the committee by a hospital employee as a committee member shall be part of the employee's work time and the hospital shall compensate that member for that time accordingly. The hospital shall relieve the committee member of other work duties during committee meetings.

(C) The committee shall meet at least quarterly.

(D) The responsibilities of the committee shall be to:

(i) develop and recommend to the hospital's governing body a nurse staffing plan that meets the requirements of paragraph (2) of this subsection;

(ii) review, assess and respond to staffing concerns expressed to the committee;

(iii) identify the nurse-sensitive outcome measures the committee will use to evaluate the effectiveness of the official nurse services staffing plan;

(iv) evaluate, at least semiannually, the effectiveness of the official nurse services staffing plan and variations between the plan and the actual staffing; and

(v) submit to the hospital's governing body, at least semiannually, a report on nurse staffing and patient care outcomes, including the committee's evaluation of the effectiveness of the official nurse services staffing plan and aggregate variations between the staffing plan and actual staffing.

(2) The hospital shall adopt, implement and enforce a written official nurse services staffing plan. As used in this subsection, "patient care unit" means a unit or area of a hospital in which registered nurses provide patient care.

(A) The official nurse services staffing plan and policies shall:

(i) require significant consideration be given to the nurse staffing plan recommended by the hospital's nurse staffing committee and the committee's evaluation of any existing plan;

(ii) be based on the needs of each patient care unit and shift and on evidence relating to patient care needs;

(iii) require use of the official nurse services staffing plan as a component in setting the nurse staffing budget;

(iv) encourage nurses to provide input to the nurse staffing committee relating to nurse staffing concerns;

(v) protect nurses who provide input to the nurse staffing committee from retaliation; and

(vi) comply with this subsection.

(B) The plan shall:

(i) set minimum staffing levels for patient care units that are:

(I) based on multiple nurse and patient considerations; and

(II) determined by the nursing assessment and in accordance with evidence-based safe nursing standards; and

(ii) include a method for adjusting the staffing plan shift to shift for each patient care unitto provide staffing flexibility to meet patient needs;

(iii) include a contingency plan when patient care needs unexpectedly exceed direct patient care staff resources;

(iv) include how on-call time will be used;

(v) reflect current standards established by private accreditation organizations, governmental entities, national nursing professional associations, and other health professional organizations;

(vi) include a mechanism for evaluating the effectiveness of the official nurse services staffing plan based on patient needs, nursing-sensitive quality indicators, nurse satisfaction measures collected by the hospital, and evidence based nurse staffing standards; and

(vii) be used by the hospital as a component in setting the nurse staffing budget and guiding the hospital in assigning nurses hospital wide.

(C) The hospital shall make readily available to nurses on each patient care unit at the beginning of each shift the official nurse services staffing plan levels and current staffing levels for that unit and that shift.

(3) The hospital shall annually report to the department on:

(A) whether the hospital's governing body has adopted a nurse staffing policy;

(B) whether the hospital has established a nurse staffing committee that meets the membership requirements of paragraph (1) of this subsection;

(C) whether the nurse staffing committee has evaluated the hospital's official nurse services staffing plan and has reported the results of the evaluation to the hospital's governing body; and

(D) the nurse-sensitive outcome measures the committee adopted for use in evaluating the hospital's official nurse services staffing plan.

(4) Mandatory overtime. The hospital shall adopt, implement and enforce policies on use of mandatory overtime.

(A) As used in this subsection:

(i) "on-call time" means time spent by a nurse who is not working but who is compensated for availability; and

(ii) "mandatory overtime" means a requirement that a nurse work hours or days that are in addition to the hours or days scheduled, regardless of the length of a scheduled shift or the number of scheduled shifts each week. Mandatory overtime does not include prescheduled on-call time or time immediately before or after a scheduled shift necessary to document or communicate patient status to ensure patient safety.

(B) A hospital may not require a nurse to work mandatory overtime, and a nurse may refuse to work mandatory overtime.

(C) This section does not prohibit a nurse from volunteering to work overtime.

(D) A hospital may not use on-call time as a substitute for mandatory overtime.

(E) The prohibitions on mandatory overtime do not apply if:

(i) a health care disaster, such as a natural or other type of disaster that increases the need for health care personnel, unexpectedly affects the county in which the nurse is employed or affects a contiguous county;

(ii) a federal, state, or county declaration of emergency is in effect in the county in which the nurse is employed or is in effect in a contiguous county;

(iii) there is an emergency or unforeseen event of a kind that:

(I) does not regularly occur;

(II) increases the need for health care personnel at the hospital to provide safe patient care; and

(III) could not prudently be anticipated by the hospital; or

(iv) the nurse is actively engaged in an ongoing medical or surgical procedure and the continued presence of the nurse through the completion of the procedure is necessary to ensure the health and safety of the patient. The nurse staffing committee shall ensure that scheduling a nurse for a procedure that could be anticipated to require the nurse to stay beyond the end of his or her scheduled shift does not constitute mandatory overtime.

(F) If a hospital determines that an exception exists under subparagraph (E) of this paragraph, the hospital shall, to the extent possible, make and document a good faith effort to meet the staffing need through voluntary overtime, including calling per diems and agency nurses, assigning floats, or requesting an additional day of work from off-duty employees.

(G) A hospital may not suspend, terminate, or otherwise discipline or discriminate against a nurse who refuses to work mandatory overtime.

(k) Outpatient services. If the facility provides outpatient services within the facility, written policies and procedures describing the operation of the services shall be adopted, implemented and enforced.

(l) Pharmacy services. The facility shall provide pharmaceutical services that meet the needs of the patients.

(1) License. A facility that stores and dispenses prescription drugs for administration to a patient by a person authorized by law to administer the drug, shall be licensed, as required, by the Texas State Board of Pharmacy.

(2) Organization. The facility shall have a pharmacy directed by a licensed pharmacist.

(3) Medical staff. The medical staff shall be responsible for developing policies and procedures that minimize drug errors. This function may be delegated to the facility's organized pharmaceutical services.

(4) Pharmacy management and administration. The pharmacy or drug storage area shall be administered in accordance with accepted professional principles.

(A) Standards of practice as defined by state law shall be followed regarding the provision of pharmacy services.

(B) The pharmaceutical services shall have an adequate number of personnel to ensure quality pharmaceutical services including emergency services.

(i) The staff shall be sufficient in number and training to respond to the pharmaceutical needs of the patient population being served. There shall be an arrangement for emergency services.

(ii) Employees shall provide pharmaceutical services within the scope of their license and education.

(C) Drugs and biologicals shall be properly stored to ensure ventilation, light, security, and temperature controls.

(D) Records shall have sufficient detail to follow the flow of drugs from entry through dispensation.

(E) There shall be adequate controls over all drugs and medications including floor stock. Drug storage areas shall be approved by the pharmacist, and floor stock lists shall be established.

(F) Inspections of drug storage areas shall be conducted throughout the hospital under pharmacist supervision.

(G) There shall be a drug recall procedure.

(H) A full-time, part-time, or consulting pharmacist shall be responsible for developing, supervising, and coordinating all the activities of the pharmacy services.

(i) Direction of pharmaceutical services may not require on premises supervision but may be accomplished through regularly scheduled visits in accordance with state law.

(ii) A job description or other written agreement shall clearly define the responsibilities of the pharmacist.

(I) Current and accurate records shall be kept of the receipt and disposition of all scheduled drugs.

(i) There shall be a record system in place that provides the information on controlled substances in a readily retrievable manner which is separate from the patient record.

(ii) Records shall trace the movement of scheduled drugs throughout the services, documenting utilization or wastage.

(iii) The pharmacist shall be responsible for determining that all drug records are in order and that an account of all scheduled drugs is maintained and reconciled with written orders.

(5) Delivery of services. In order to provide patient safety, drugs and biologicals shall be controlled and distributed in accordance with applicable standards of practice, consistent with federal and state laws.

(A) All compounding, packaging, and dispensing of drugs and biologicals shall be under the supervision of a pharmacist and performed consistent with federal and state laws.

(B) Drugs and biologicals shall be kept in a locked storage area.

(i) A policy shall be adopted, implemented, and enforced to ensure the safeguarding, transferring, and availability of keys to the locked storage area.

(ii) Dangerous drugs as well as controlled substances shall be secure from unauthorized use.

(C) Outdated, mislabeled, or otherwise unusable drugs and biologicals shall not be available for patient use.

(D) When a pharmacist is not available, drugs and biologicals shall be removed from the pharmacy or storage area only by personnel designated in the policies of the medical staff and pharmaceutical service, in accordance with federal and state laws.

(i) There shall be a current list of individuals identified by name and qualifications who are designated to remove drugs from the pharmacy.

(ii) Only amounts sufficient for immediate therapeutic needs shall be removed.

(E) Drugs and biologicals not specifically prescribed as to time or number of doses shall automatically be stopped after a reasonable time that is predetermined by the medical staff.

(i) Stop order policies and procedures shall be consistent with those of the nursing staff and the medical staff rules and regulations.

(ii) A protocol shall be established by the medical staff for the implementation of the stop order policy, in order that drugs shall be reviewed and renewed, or automatically stopped.

(iii) A system shall be in place to determine compliance with the stop order policy.

(F) Drug administration errors, adverse drug reactions, and incompatibilities shall be immediately reported to the attending physician and, if appropriate, to the facility-wide quality assurance program. There shall be a mechanism in place for capturing, reviewing, and tracking medication errors and adverse drug reactions.

(G) Abuses and losses of controlled substances shall be reported, in accordance with applicable federal and state laws, to the individual responsible for the pharmaceutical services, and to the chief executive officer, as appropriate.

(H) Information relating to drug interactions and information on drug therapy, side effects, toxicology, dosage, indications for use, and routes of administration shall be immediately available to the professional staff.

(i) A pharmacist shall be readily available by telephone or other means to discuss drug therapy, interactions, side effects, dosage, assist in drug selection, and assist in the identification of drug induced problems.

(ii) There shall be staff development programs on drug therapy available to facility staff to cover such topics as new drugs added to the formulary, how to resolve drug therapy problems, and other general information as the need arises.

(I) A formulary system shall be established by the medical staff to ensure quality pharmaceuticals at reasonable costs.

(m) Quality assurance. The governing body shall ensure that there is an effective, facility-wide quality assurance (QA) program to evaluate the provision of patient care.

(1) Implementation plan. The facility-wide QA program shall be on-going and have a written plan of implementation.

(A) All organized services related to patient care, including services furnished by contract, shall be evaluated.

(B) Nosocomial infections and medication therapy shall be evaluated.

(C) All medical services performed in the facility shall be evaluated as they relate to appropriateness of diagnosis and treatment.

(2) Implementation. The facility shall take and document appropriate remedial action to address deficiencies found through the QA program. The facility shall document the outcome of the remedial action.

(n) Radiology services. When radiology services are provided, written policies and procedures shall be adopted, implemented and enforced which describe the radiology services provided in the facility and how employee and patient safety will be maintained.

(1) Proper safety precautions shall be maintained against radiation hazards. This includes adequate shielding for patients, personnel, and facilities.

(2) Inspection of equipment shall be made periodically. Defective equipment shall be promptly repaired or replaced.

(3) Radiation workers shall be checked, by the use of exposure meters or badge tests, for amount of radiation exposure. Exposure reports and documentation shall be available for review.

(4) Radiology services shall be provided only on the order of individuals with privileges granted by the medical staff and of other physicians or practitioners authorized by the medical staff and governing body to order such services.

(5) Personnel.

(A) A qualified full-time, part-time, or consulting radiologist shall supervise the ionizing radiology services and shall interpret only those radiology tests that are determined by the medical staff to require a radiologist's specialized knowledge. For purposes of this section a radiologist is a physician who is qualified by education and experience in radiology in accordance with medical staff bylaws.

(B) Only personnel designated as qualified by the medical staff shall use the radiology equipment and administer procedures.

(6) Records. Records of radiology services shall be maintained. The radiologist or other individuals who have been granted privileges to perform radiology services shall sign reports of his or her interpretations.

(o) Respiratory care services. When respiratory care services are provided, written policies and procedures shall be adopted, implemented, and enforced which describe the provision of respiratory care services in the facility. Personnel qualified to perform specific proce-

dures and the amount of supervision required for personnel to carry out specific procedures shall be designated in writing.

(p) Waste and waste disposal.

(1) Special waste and liquid/sewage waste management.

(A) The hospital shall comply with the requirements set forth by the department in §§1.131 - 1.137 of this title (relating to Definition, Treatment, and Disposition of Special Waste from Health Care Related Facilities) and the Texas Commission on Environmental Quality (TCEQ) requirements in 30 TAC §330.1207 (relating to Generators of Medical Waste).

(B) All sewage and liquid wastes shall be disposed of in a municipal sewerage system or a septic tank system permitted by the TCEQ in accordance with 30 TAC Chapter 285 (relating to On-Site Sewage Facilities).

(2) Waste receptacles.

(A) Waste receptacles shall be conveniently available in all toilet rooms, patient areas, staff work areas, and waiting rooms. Receptacles shall be routinely emptied of their contents at a central location(s) into closed containers.

(B) Waste receptacles shall be properly cleaned with soap and hot water, followed by treatment of inside surfaces of the receptacles with a germicidal agent.

(C) All containers for other municipal solid waste shall be leak-resistant, have tight-fitting covers, and be rodent-proof.

(D) Non-reusable containers shall be of suitable strength to minimize animal scavenging or rupture during collection operations.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Lisa Hernandez
General Counsel
Department of State Health Services
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For further information, please call: (512) 458-7111 x6972

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CHAPTER 229. FOOD AND DRUG

The Executive Commissioner of the Health and Human Services Commission (commission) on behalf of the Department of State Health Services (department) adopts amendments to §§229.21 - 229.26, concerning the donation of unused drugs; and §§229.419 - 229.430, concerning the licensing of wholesale distributors of prescription drugs, including good manufacturing practices. The amendments to §§229.22, 229.421 and 229.429 are adopted with changes to the proposed text as published in the July 23, 2010, issue of the *Texas Register* (35 TexReg 6460). Sections 229.21, 229.23 - 229.26, 229.419, 229.420, 229.422 - 229.428, and 229.430 are adopted without changes, and the sections will not be republished.

BACKGROUND AND PURPOSE

The amendments to Subchapter B, §§229.21 - 229.26, and Subchapter W, §§229.419 - 229.430, of the department's food and drug rules are necessary to implement legislative changes to the Health and Safety Code, Chapter 431, and to satisfy the required four-year review of agency rules previously adopted. The Health and Safety Code, Chapter 431, was amended by Senate Bill (SB) 943 and SB 1896, 80th Legislature, Regular Session, 2007, and SB 1645, 81st Legislature, Regular Session, 2009, to address charitable drug donations (Subchapter B) and new challenges to the integrity of the prescription drug distribution system (Subchapter W) as a result of the threat of counterfeit and adulterated drugs. The primary purpose for amending Subchapter B is to expand the definition of "charitable medical clinics" to include "a licensed pharmacy that is a community pharmaceutical access program provider." The primary purposes for the proposed rule changes under Subchapter W are to implement more stringent licensing requirements applicable to prescription drug wholesalers and to outline the steps necessary for the passing of prescription drug pedigrees. Current law requires licensing wholesalers and tracking drugs through commerce by means of "pedigree" documentation in certain instances. Texas law requires further change to Subchapter W to mirror newly clarified U.S. Food and Drug Administration (FDA) requirements in 21 Code of Federal Regulations (CFR), Parts 203 and 205, the regulations that implement the Prescription Drug Marketing Act of 1987 (PDMA), as modified by the Prescription Drug Amendments of 1992. Other amendments to this subchapter include updating mailing addresses and agency names, and making minor grammatical or format changes.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 229.21 - 229.26 (Subchapter B), and §§229.419 - 229.430 (Subchapter W), have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed.

SECTION-BY-SECTION SUMMARY

Subchapter B amendments: The amendment to §229.21 expands the definition of "charitable medical clinic" by inserting the words "including a licensed pharmacy that is a community pharmaceutical access program provider" after the word "clinic." A new definition, "community pharmaceutical access program" is added at §229.21(3). The new definition, which states "A program offered by a licensed pharmacy under which the pharmacy assists financially disadvantaged persons to access prescription drugs at no charge or at a substantially reduced charge," is added as a specific type of business that engages in drug donation for charitable purposes. The preceding amendments are new in the statute. The definition of "wholesale distribution" of donated drugs in §229.21(13) is amended to reflect the new definition of "wholesale distributor" of prescription drugs added to Subchapter W at §229.421(29). Thus, "wholesale distribution" is amended by substituting the last term, "or wholesaler," and adding after the word "jobber" the following list of firm types: "private label distributor, broker, manufacturer warehouse, distributor warehouse, or other warehouse, manufacturer's exclusive distributor, drug wholesaler or distributor, independent wholesale drug trader, specialty wholesale distributor, third party logistics provider, retail pharmacy that conducts wholesale distribution, and pharmacy warehouse that conducts wholesale distribution." The name of the department is updated and the rule is also renumbered.

Additional amendments to Subchapter B were necessary to reflect the expanded definition of charitable medical clinic, to update mailing addresses, the agency name, and to correct minor grammatical or format changes, and revise rule references.

Subchapter W amendments: Amendments to §229.419 clarified the purpose of the rules by substituting the word "requirements" for "standards" as a term that is more commonly used throughout the rules, as well as correcting grammar.

Section 229.420 is renumbered and updates references to add and remove certain parts of CFR Title 21 which the department adopts and incorporates by reference. The new reference sections being added are: 21 CFR, Part 1300, Definitions; 21 CFR, Part 1301, Registration of Manufacturers, Distributors, and Dispensers of Controlled Substances; 21 CFR, Part 1304, Records and Reports of Registrants; 21 CFR, Part 1305, Orders for Schedule I and Schedule II Controlled Substances; 21 CFR, Part 1306, Prescriptions; and, 21 CFR, Part 1307, Miscellaneous.

Adopted and incorporated sections of 21 CFR Sections that are deleted from §229.420 are: 21 CFR, Part 429, Drugs Composed Wholly or Partly of Insulin; 21 CFR, Part 430, Antibiotic Drugs; 21 CFR, Part 431, Certification of Antibiotic Drugs; 21 CFR, Part 432, Packaging and Labeling of Antibiotic Drugs; 21 CFR, Part 433, Exemptions from Antibiotic Certification and Labeling Requirements; 21 CFR, Part 436, Tests and Methods of Assay of Antibiotic and Antibiotic-containing Drugs; 21 CFR, Part 440, Penicillin Antibiotic Drugs; 21 CFR, Part 441, Penem Antibiotic Drugs; 21 CFR, Part 442, Cepha Antibiotic Drugs; 21 CFR, Part 444, Oligosaccharide Antibiotic Drugs; 21 CFR, Part 446, Tetracycline Antibiotic Drugs; 21 CFR, Part 448, Peptide Antibiotic Drugs; 21 CFR, Part 449, Antifungal Antibiotic Drugs; 21 CFR, Part 450, Antitumor Antibiotic Drugs; 21 CFR, Part 452, Macrolide Antibiotic Drugs; 21 CFR, Part 453, Lincomycin Antibiotic Drugs; 21 CFR, Part 455, Certain Other Antibiotic Drugs; 21 CFR, Part 460, Antibiotic Drugs Intended for Use in Laboratory Diagnosis of Disease; and 21 CFR, Part 650, Additional Standards for Diagnostic Substances Dermal Test. In addition, §229.420 makes minor grammatical or format changes.

Section 229.421 has new, amended and deleted definitions and, therefore, is renumbered. New definitions are included to facilitate the purpose of the legislative amendments: to help protect the integrity of the prescription drug distribution system. For clarification purposes, the term "broker" is now defined and included in the definition of wholesale distributor. "Co-licensed product partner" is added as a type of firm that can be considered a manufacturer or a participant in the manufacturing process and will be regulated as such. The definition "drop shipment" is necessary to clarify this particular method of wholesale drug distribution. The new definition of "manufacturer's exclusive distributor" defines a type of wholesale drug distribution. A definition of "normal distribution channel" provides exemptions from the requirement of a firm to pass a document identifying the movement of a prescription drug from manufacturer to the final recipient for certain entities engaged in specific transactions listed. The definition of "pharmacy warehouse" is added to describe a particular type of wholesale drug distributor. The definition "third party logistics provider" is added as a specific description of a type of wholesale drug distributor. The definition of "verification" is added to specify what a firm must do in order to determine if a document that traces a prescription drug from manufacturer to final recipient is true and correct. "Wholesale distributor" is added to provide specific examples of persons engaged in the practice of wholesale distribution.

Definitions that are amended in §229.421 include the following: "adulterated drug" is amended by deleting the phrase "Chapter 431" because that term is considered redundant when the specific citation, §431.111, is listed. The definition of "manufacturer" is amended by adding the sentence "A person licensed or approved by the United States Food and Drug Administration to engage in the manufacture of drugs or devices, consistent with the federal agency's definition of "manufacturer" under the agency's regulations and guidances implementing the Prescription Drug Marketing Act of 1987 (Pub. L. No. 100 - 293)" for additional clarification. The term "pharmacist engaged in" is added before the word "compounding" to correct the applicability of the term "manufacturer" to a person rather than to an action.

The amendment of §229.421(28), the definition of "wholesale distribution," not only reflects that Subchapter W pertains to the distribution of prescription drugs only, but also defines and clarifies which transactions are excluded from this definition. Intracompany sales now include transactions between co-licensed product partners, one of the new definitions listed previously. Transferring a prescription drug between pharmacies to alleviate a temporary shortage is now excluded or exempt from the definition of wholesale distribution. Sales of reasonable quantities of prescription drugs by a pharmacy to a licensed practitioner for office use are exempt. However, sales of reasonable quantities of prescription drugs by a pharmacy to a patient or patient's representative are no longer excluded from the definition. The act of selling, purchasing, offering, or trading a drug, under the authority of a prescription, is now exempt. The sale, transfer, merger, or consolidation of all or part of the business of a pharmacy from or with another pharmacy is now exempt. The delivery of, or offer to deliver, a prescription drug by a common carrier solely in the common carrier's usual course of business of transporting prescription drugs, if the common carrier does not store, warehouse, or take legal ownership of the prescription drug, is now exempt. The sale or transfer from a retail pharmacy or pharmacy warehouse of expired, damaged, returned, or recalled prescription drugs to the original manufacturer or to a third-party returns processor in accordance with the procedures set out in Title 21, CFR, §203.23(a)(1) - (5), for other returns is now exempt. The purchase or other acquisition by a hospital or other health care entity that is a member of a purchasing group is exempt under certain scenarios. The transfer or offer of transfer of a drug by a charitable organization described in §501(c)(3) of the Internal Revenue Code of 1954 to a nonprofit affiliate of the organization to the extent otherwise permitted by law is exempt. The offer or sale of a drug among hospitals or other health care entities that are under common control is exempt. The definition of common control also is clarified under this exemption. The sale, purchase, or trade of blood and blood components intended for transfusion is now exempt. The definition of "place of business," previously §229.421(17), is deleted because the term is not universally applicable to those firms engaged in the wholesale drug distribution channel regulated under Subchapter W.

Section 229.422 is amended by substituting the word "drug" for "drugs;" and correcting minor grammatical errors.

The phrase "for use in humans" is deleted from the first sentence of §229.423(b) because distributors of veterinary drugs are regulated under Subchapter W. Additional amendments to §229.423(b) expand certain exemptions from licensing under Subchapter W as provided by the new amendments to the

Health and Safety Code, Chapter 431, and to mirror the exemptions from licensing that the U.S. Food and Drug Administration also allows. Existing exemptions are deleted and replaced with new, clarified exemptions which include the following: those engaged in intra-company sales are exempt from the requirement to license and the term "intracompany sales" is specifically defined under new §229.423(b)(1). A hospital, health care entity, or charitable institution that returns drugs in accordance with Title 21, CFR, §203.23 is now exempt from the requirement to license. Pharmacies that sell reasonable quantities of prescription drugs to practitioners for office use are now exempt. Persons, who sell, transfer, merge, or consolidate all or part of the business of a pharmacy from or with another pharmacy are now exempt. Common carriers that deliver or offer to deliver, a prescription drug in the usual course of business are exempt if the common carrier does not store, warehouse, or take legal ownership of the prescription drug. Pharmacies and pharmacy warehouses that sell or transfer expired, damaged, returned, or recalled prescription drugs to the original manufacturer or to a third-party returns processor in accordance with procedures set out in Title 21, CFR, §203.23(a)(1) - (5) are exempt. Hospitals or health care entities that are members of a group purchasing organization that purchase a drug for their own use from the group purchasing organization or from other hospitals or health care entities that are members of such organizations are exempt. In addition, amendments to §229.423(d) provide exemptions from certain, specified licensing requirements and procedures before receiving a license to those wholesale drug distributors described in the rule itself. The entities that are defined under this exemption include: wholesale distributors that are manufacturers or third-party logistics providers on behalf of the manufacturers; and a state agency or a political subdivision of this state that distributes prescription drugs using federal or state funding to nonprofit health care facilities or local mental health or mental retardation authorities for distribution to a pharmacy, practitioner, or patient. In addition, the Executive Commissioner of the Health and Human Services Commission may exempt by rule specific purchases of prescription drugs by state agencies and political subdivisions under certain circumstances. Additional amendments to §229.423 include other minor grammatical or format changes.

Amendments to §229.424, "Licensure Requirements," include the following: the phrase "as defined in §229.421(29) - (30) of this title" is added after the word "Texas" to link the term "person" back to the definition of wholesale distributor and to link the act of wholesale distribution back to the definition of wholesale distribution. Section 229.424(d)(6) is amended by adding the phrase "except in a circumstance, as the department determines reasonable, in which more than one licensed wholesale distributor is co-located in the same place of business at the same address and the wholesale distributors are members of an affiliated group, as defined by §1504, Internal Revenue Code of 1986." This amendment was made at the request of stakeholders for whom this situation applies. Section 229.424(m)(1) is amended by deleting the phrase "prior to the expiration date of the current license" and substituting the phrase "not later than the 30th day after the date the wholesale distributor receives a renewal notification form from the department." Bonding requirements and details are set out in §229.424(n), including: setting the amount of the bond or other equivalent security at $100,000; the purpose of the bond, to secure payment of fines or penalties imposed in connection with any enforcement actions; and the time period during which the department may stake a claim against the bond. Pharmacy warehouses that are not engaged in wholesale distribution are exempt from the requirement to provide a bond; and a single bond may be submitted to cover all places of business operated by a wholesale drug distributor in this state.

Certain phrases in §229.425, "Licensing Procedures," are deleted and amended to modify the contents of an application for a wholesale license to distribute prescription drugs, and, therefore, the paragraphs and subparagraphs of this rule are renumbered. The reworded requirements of §229.425(b) include the following: the applicant must provide the name, full business address, and telephone number; the applicant must provide the name of a contact person for each of the applicant's places of business; the applicant must describe the type of business entity, whether the business is a person, sole proprietorship, partnership or corporation; and the name of each person, partner, officer and director must be provided. The following provision has been deleted: managers of a business are no longer required to supply information showing whether they meet the qualifications to represent the business. Additional requirements that a person must meet under §229.425(c) to become a designated representative of a firm include: whether the designated representative has been involved in a criminal proceeding; whether the designated representative, as an officer or director of a pharmaceutical related business, has been involved in a lawsuit; and a description of any misdemeanor offense for which the designated representative was found guilty.

Section 229.425(e) amends the requirement for license renewal by adding the phrase "Not later than the 30th day after the date the wholesale distributor receives the form, the wholesale distributor shall identify and state under oath to the department any change in or correction to the information." A new procedure for obtaining a replacement license is included under §229.425(f) because of the need for consistency in handling such requests. Section 229.425(g) sets out the method by which applications may be submitted to the department. Lastly, a bond requirement is added under §229.425(h) which is required to be submitted with the application for a wholesale drug distributor license.

In addition, §229.425 substitutes references to Texas Online to texas.gov, and makes other minor grammatical or format changes.

The amendment to §229.426, "Report of Changes," substitutes references to texas.gov. for Texas Online and updates the department's mailing address.

Licensing fees are amended by §229.427 to consolidate and simplify the licensing categories and to ensure that out-of-state licensees pay the same fee as in-state licensees. An additional fee for requests for replacement permits is also added to compensate for the costs associated with handling such requests. Additionally, new §229.427(a)(3) is added to set out the fees to be paid by manufacturers of only medical gases. The term "compressed" is removed from every reference to medical gas because it is an unnecessary qualifier for that term.

Amendments to §229.428 add new provisions as grounds to refuse, suspend or revoke a license which include: the furnishing of false or fraudulent information in an application; and a licensee's failure to continue to meet the qualifications for obtaining a license under Health and Safety Code, §431.405. Additional amendments to §229.428 include other minor grammatical or format changes.

Amendments to §229.429 clarify the requirements for returns of prescription drugs, and set out the requirements for those re-

turns to be exempt from the tracking requirements of a pedigree. The amendments to this section also clarify when a pedigree is required, what the pedigree must contain, and how a pedigree may be verified. Under §229.429(f)(1), returns must be conducted in the manner described by these new amendments which include: non-saleable prescription drugs returned to the wholesale distributor may only be returned to either the original manufacturer or a third party returns processor; the process of returning drugs must be secure and prevent the introduction of adulterated or counterfeit drugs into the distribution channel; and all other returns must comply with the requirements of Title 21, CFR, §201.23(a)(1) - (5). A specific licensing exemption also is provided to certain pharmacies that engage in the sale or transfer of expired, damaged, returned, or recalled prescription drugs to the originating wholesale distributor or manufacturer under §229.429(f)(1)(C). Returns or exchanges of salable items, including redistribution of returns and exchanges, are exempt under §229.429(f)(1)(A) from the requirement to have a pedigree under only three conditions: if those returns or exchanges are exempt under §503, Prescription Drug Marketing Act of 1987 (21 U.S.C. §353(c)(3)(B)); or the regulations adopted by the Secretary of the U.S. Department of Health and Human Services to administer and enforce that Act; or the interpretations of that Act set out in the compliance policy guide of the United States Food and Drug Administration.

Amendments to §229.429(f)(2) clarify that out-of-state wholesale drug distributors shall verify, prior to purchasing or receiving product, that the suppliers of drugs are licensed in Texas and shall notify the department of unlicensed wholesale distributors.

Section 229.429(f)(3) addresses details and requirements concerning pedigree. Persons who are required to provide or pass a pedigree include: a person who is engaged in the wholesale distribution of a prescription drug, including a repackager (but excluding the original manufacturer), for any drug that leaves the normal channel of distribution. A pharmacy or pharmacy warehouse must offer a pedigree only if it is engaged in the wholesale distribution of a drug. After publication of the proposed rules, provisions previously set out in subsections (B) and (D) of §229.429(f)(3) were deleted in their entirety based on amendments to Health and Safety Code, §431.412; as a result, the remaining subsections of 229.429(f)(3) were relettered.

New §229.429(f)(3)(D) and (E) set forth the contents of a pedigree. A pedigree must include the following: enough information to identify each prior sale of the drug; the name, address, telephone number, and, if available, the e-mail address of each person who owns the prescription drug and each wholesale distributor of the prescription drug; the name and address of each location from which the product was shipped, if different from the owner's name and address; the transaction dates; certification that each recipient has authenticated the pedigree; name of the prescription drug; dosage form and strength of the prescription drug; size of the container; number of containers; lot number of the prescription drug; and name of the manufacturer of the finished dosage form.

New section 229.429(f)(3)(G) sets the verification standard and describes the various procedures by which each transaction listed on the pedigree may be verified. The verification process requires authenticating that each prior transaction occurred prior to further wholesale distribution. Verification may be accomplished through confirmation by invoice review; telephone calls; emails; electronic web-based systems; notarized documents; exclusive purchasing; or any other method approved by the department.

Section 229.430, "Enforcement and Penalties," is amended by removing the phrase, "Administrative and civil penalties will be assessed using the Severity Levels contained in §229.251 of this title (relating to Minimum Standards for Licensure)" because the language was confusing and unnecessary.

COMMENTS

The department, on behalf of the commission, has reviewed comments received regarding the proposed rules during the comment period and prepared responses to them, responses which the commission has reviewed and accepts. The commenters were individuals, associations, and/or groups, including the following: Health Industry Distributors Association, Pharmaceutical Research and Manufacturers of America, National Association of Chain Drug Stores, and National Coalition of Pharmaceutical Distributors, Representative Ruth Jones McClendon, and Len Neeper with Advantage Medical Supply. The commenters were not against the rules in their entirety; however, the commenters suggested some changes. A summary of the comments as well as the department's responses to each are set out as follows.

Comment: Concerning the definition of "Manufacturer's exclusive distributor" found in §229.421(17), two commenters stated that the new language requiring a manufacturer's exclusive distributor to also be an authorized distributor of record subsequently changes the definition "normal channel of distribution" to exclude licensed wholesale drug distributors that are not authorized distributors of record, but receive drugs directly from the manufacturer under an exclusive contract with that manufacturer.

Response: The commission acknowledges this comment. The proposed language was added to the definition of "manufacturer's exclusive distributor" in Health and Safety Code, §431.401(4-b) by Acts 2009, 81st Legislature, Regular Session, Chapter 1384, §3. No change was made to the rule as a result of this comment.

Comment: Concerning the definition of "normal channel of distribution" in §229.421(20)(C), one commenter expressed concern that the language which allows distribution of a prescription drug from a manufacturer to an authorized distributor of record to another licensed wholesale distributor to another person authorized by law to administer a drug to a patient might create a security problem.

Response: The commission acknowledges this comment. This specific language was added to the definition of "normal channel of distribution" in Health and Safety Code, §431.401(5)(C) by Acts 2009, 81st Legislature, Regular Session, Chapter 1384, §3. No change was made to the rule as a result of this comment.

Comment: Concerning the definition of "normal channel of distribution" in §229.421(20)(C), one commenter suggested that the exemption broadens federal law.

Response: The commission disagrees. The commenter did not provide a specific legal citation, and the commission is not aware of any conflict with federal law. No change was made to the rule as a result of this comment.

Comment: Concerning the definition of "third-party logistics provider" found in §229.421(26), one commenter stated that the new language requiring a third-party logistics provider to also

be an authorized distributor of record changes the definition of normal channel of distribution to exclude non-authorized distributor of record licensed wholesalers who contract directly with a manufacturer to provide this service.

Response: The commission acknowledges this comment. The definition of "third-party logistics provider" was added to Health and Safety Code, §431.401(10-a), by Acts 2009, 81st Legislature, Regular Session, Chapter 1384, §3. No change was made to the rule as a result of this comment.

Comment: Concerning the definition of "verification" in §229.421(27) one commenter suggested that the phrase "engaging in wholesale distribution" be added in order to be consistent with the intent of the language in Health and Safety Code, §431.412(d), and §431.413(a)(4), which describes persons to whom verification and authentication requirements apply.

Response: The commission agrees that the definition of "verification" in §229.421(27) refers directly to Health and Safety Code, §431.412(d). Therefore, the language is changed to reflect the wording used in Health and Safety Code, §431.412(d).

Comment: Concerning §229.424(n), the requirements for applicants to submit a bond to the department, three commenters suggested that the bond amount be reduced or restructured in a manner that more objectively considers the size and revenues of the affected businesses.

Response: The commission disagrees. Health and Safety Code, §431.408(a), requires that a bond of $100,000 be submitted to the department when a firm applies for or renews its license. No change was made to the rule as a result of this comment.

Comment: Concerning §229.429(f)(1)(D), one commenter requested that this section be removed because the citation references pediatric drug studies instead of prescription drug returns.

Response: The commission agrees to strike the reference to Title 21 CFR §201.23(a)(1) - (5) because it is a typographical error. The reference is corrected to read Title 21 CFR §203.23(a)(1) - (5).

Comment: Concerning §229.429(f)(1)(D) one commenter requested the section be stricken in its entirety. The commenter stated that applying further requirements on returns beyond what is required by state law and the federal government is inconsistent with existing statutory language and federal regulations.

Response: The commission disagrees. The reference to Title 21 CFR §201.23(a)(1) - (5) was determined to be a typographical error, and the corrected reference to Title 21 CFR §203.23(a)(1) - (5) pertains to returns of prescription drugs. The commission is simply adopting a section of the CFR which describes requirements for certain types of returns of prescription drugs. The commission interprets this to be consistent with the language crafted by the legislature. No change was made to the rule as a result of this comment.

Comment: Concerning §229.429(f)(3)(A), one commenter requested that the original manufacturer not be excluded from the requirement to pass a pedigree for each prescription drug that has left the normal distribution channel since it appears not to follow legislative intent.

Response: The commission disagrees. The exclusion of an original manufacturer from the requirement to pass pedigree is language added to Health and Safety Code, §431.412(a), by Acts 2005, 79th Legislature, Chapter 282, §3(g). No change was made to the rule as a result of this comment.

Comment: Concerning §229.429(f)(3)(B), the sale of a reasonable quantity of a drug to a practitioner for office use, one commenter noted that this language was deleted from Health and Safety Code, §431.412, by Acts 2007, 80th Legislature, Regular Session, Chapter 980, §14.

Response: The commission agrees. The language of this provision is deleted and the remaining sections of this rule relettered.

The following changes have been made to provide consistency of terms to further clarify the intent of the rule.

The rule reference in §229.22(15) was revised to reflect §229.251 of this title (relating to Minimum Standards for Licensure).

In §229.421(27), a rule referenced was revised; in §229.429(f)(2), language was added to clarify that suppliers of drugs must be physically located in Texas; and the word "electron" in §229.429(f)(3)(G)(ii)(III) was changed to "electronic."

Section 229.429(f)(3)(D), regarding sales between licensed firms under common ownership, was deleted and the remaining sections of this rule relettered because this language was deleted from Health and Safety Code, §431.412, by Acts 2007, 80th Legislature, Regular Session, Chapter 980, §14.

Concerning new §229.429(f)(3)(G)(ii), the phrase "who is engaged in the wholesale distribution of a prescription drug, and who is" was added which will mirror the wording used in Health and Safety Code, §431.412(d), which pertains to the verification and authentication process.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

SUBCHAPTER B. DONATION OF UNUSED DRUGS

25 TAC §§229.21 - 229.26

STATUTORY AUTHORITY

The amendments are adopted under Health and Safety Code, §431.241, which provides the department with authority to adopt rules to enforce the Texas Food, Drug and Cosmetic Act; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorizes the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration and enforcement of the Health and Safety Code, Chapter 1001, including Chapter 431, the Texas Food, Drug, and Cosmetic Act. The amendment regarding fees for replacement licenses is adopted under Health and Safety Code, §12.0111, which requires the department to charge a fee for issuing or renewing a license in an amount to cover the costs to the department for administering its licensing programs; and Health and Safety Code, §12.0112, which requires that the term of each license issued by the department to be two years. Review of the rules implements Government Code, §2001.039.

§229.22. Donation of Drugs to Charitable Medical Clinics.

A charitable medical clinic may receive a drug donated by a charitable drug donor for dispensing to a patient of the charitable medical clinic, provided that the following requirements are met.

(1) The charitable drug donor must be licensed with the department as a wholesale drug distributor. Manufacturers who participate in a patient assistance program and physicians who donate samples will not be required to license with the department.

(2) The donated drugs must be dangerous drugs as defined in Health and Safety Code, Chapter 483, entitled "Texas Dangerous Drug Act."

(3) Donated drugs may not be controlled substances as defined in Health and Safety Code, Chapter 481, entitled "Texas Controlled Substances Act."

(4) All donated drugs must be approved by the Food and Drug Administration (FDA) and intended for human use.

(5) Donation of drug samples must comply with Title 21, Code of Federal Regulations (CFR), §203.39.

(6) Previously dispensed drugs shall not be donated.

(7) The charitable drug donor must verify that the requesting charity is legitimate.

(A) Verification shall include copies of documents proving the charitable medical clinic's status as exempt from federal income tax; address, telephone number, and name of contact person at the charitable medical clinic.

(B) Documentation of verification must be retained by the charitable drug donor for three years.

(8) A drug donated by a charitable drug donor shall be received by a charitable medical clinic in the manufacturer's unopened original tamper-evident packaging with its labeling intact.

(9) Delivery of a donated drug to a recipient charitable medical clinic shall be completed by an authorized agent or employee of the recipient charitable medical clinic or by the charitable drug donor. All deliveries shall be made in person. The authorized agent or employee shall present his or her official state identification to the recipient upon delivery.

(10) The recipient charitable medical clinic shall prepare at the time of collection or delivery of drugs a complete and accurate donation record, a copy of which shall be retained by the recipient charitable medical clinic for at least three years, containing the following information:

(A) a signed written statement from the charitable drug donor that the drugs have been properly stored in accordance with the manufacturer's instructions;

(B) a verifiable name, address, and telephone number of the charitable drug donor;

(C) the manufacturer, brand name, quantity, and lot or control number of the drugs donated;

(D) the date of the donation; and

(E) a copy of official state identification of the authorized agent or employee of the charitable drug donor.

(11) A donated drug shall not be dispensed to a patient until it has been examined by a registered pharmacist at the recipient charitable medical clinic to confirm that the donation record accurately describes the drug delivered, and to confirm in his or her professional judgment that no drug is adulterated or misbranded for any reason including, but not limited to, the following:

(A) the drug is out of date;

(B) the labeling has become mutilated, obscured, or detached from the drug packaging;

(C) the drug shows evidence of having been stored or shipped under conditions that might adversely affect its stability, integrity, or effectiveness;

(D) the drug has been recalled or is no longer marketed; or

(E) the drug is otherwise possibly contaminated, deteriorated, or adulterated.

(12) Documentation of the examination of the drug and the drug donation record by the registered pharmacist shall be retained by the charitable medical clinic for three years after the date of examination.

(13) The recipient charitable medical clinic shall dispose of any drug found to be adulterated/misbranded by destroying it. The charitable medical clinic shall retain complete records of the disposition of all destroyed drugs for three years from the date of destruction.

(14) Each recipient charitable medical clinic shall conduct, at least annually, an inventory of drug stocks and shall prepare a report reconciling the results of each inventory with the most recent prior inventory. Drug inventory discrepancies and reconciliation problems shall be investigated by the charitable medical clinic and outcomes documented. All reports of reconciliation, investigation, and outcome shall be retained by the charitable medical clinic for three years.

(15) All charitable drug donors shall comply with the existing statutory standards contained in the Texas Health and Safety Code, Chapter 431 and the requirements of §229.251 of this title (relating to Minimum Standards for Licensure) for "Licensing of Wholesale Distributors of Nonprescription Drugs--Including Good Manufacturing Practices."

(16) A charitable medical clinic shall immediately notify the Drugs and Medical Devices Group at (512) 834-6755, of becoming aware of a significant loss or theft of drugs; and a copy of the inventory reconciliation, investigation, and outcome report shall be forwarded to the Drugs and Medical Devices Group, Mail Code 1987, P.O. Box 149347, Austin, TX 78714-9347 within five days of the telephone notification.

(17) A charitable drug donor shall promptly notify in writing a charitable medical clinic to which donations have been made, if the donor becomes aware of a recall or other situation pertaining to the safety and efficacy of the previously donated drugs. Documentation of this notice shall be retained for three years after the date of notification.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Lisa Hernandez
General Counsel
Department of State Health Services
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For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER W. LICENSING OF WHOLESALE DISTRIBUTORS OF PRESCRIPTION DRUGS--INCLUDING GOOD MANUFACTURING PRACTICES

25 TAC §§229.419 - 229.430

STATUTORY AUTHORITY

The amendments are adopted under Health and Safety Code, §431.241, which provides the department with authority to adopt rules to enforce the Texas Food, Drug and Cosmetic Act; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorizes the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration and enforcement of the Health and Safety Code, Chapter 1001, including Chapter 431, the Texas Food, Drug, and Cosmetic Act. The amendment regarding fees for replacement licenses is adopted under Health and Safety Code, §12.0111, which requires the department to charge a fee for issuing or renewing a license in an amount to cover the costs to the department for administering its licensing programs; and Health and Safety Code, §12.0112, which requires that the term of each license issued by the department to be two years. Review of the rules implements Government Code, §2001.039.

§229.421. Definitions.

The following words and terms, when used in this subchapter, must have the following meanings, unless the context clearly indicates otherwise.

(1) Act--The Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431.

(2) Adulterated drug--Has the meaning specified in the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, §431.111.

(3) Authorized agent--An employee of the department who is designated by the commissioner to enforce the provisions of the Act.

(4) Broker--A person engaged in the offering or contracting for wholesale distribution; sale and/or transfer of a prescription drug into, within, or out of Texas; and, who does not take physical possession of the prescription drug.

(5) Change of ownership--A sole proprietor who transfers all or part of the facility's ownership to another person or persons; the removal, addition, or substitution of a person or persons as a partner in a facility owned by a partnership; a corporate sale, transfer, reorganization, or merger of the corporation which owns the facility if sale, transfer, reorganization, or merger causes a change in the facility's ownership to another person or persons; or if any other type of association, the removal, addition, or substitution of a person or persons as a principal of such association.

(6) Co-licensed product partner--One of two or more parties that have the right to engage in the manufacturing or marketing of a prescription drug consistent with the United States Food and Drug Administration's regulations and guidances implementing the Prescription Drug Marketing Act of 1987 (Pub. L. No. 100 - 293).

(7) Commissioner--Commissioner of the Department of State Health Services.

(8) Department--The Department of State Health Services.

(9) Device--An instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component, part, or accessory, that is:

(A) recognized in the official United States Pharmacopoeia National Formulary or any supplement to it;

(B) intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease in man or other animals; or

(C) intended to affect the structure or any function of the body of man or other animals and that does not achieve any of its principal intended purposes through chemical action within or on the body of man or other animals and is not dependent on metabolization for the achievement of any of its principal intended purposes.

(10) Drop shipment--The sale of a prescription drug to a wholesale distributor by the manufacturer of the prescription drug, or by the manufacturer's co-licensed product partner, third-party logistics provider, or exclusive distributor, in which:

(A) the wholesale distributor takes title but not physical possession of the prescription drug;

(B) the wholesale distributor invoices the pharmacy, pharmacy warehouse, or other person authorized by law to dispense or administer the drug to a patient; and

(C) the pharmacy, pharmacy warehouse, or other authorized person receives delivery of the prescription drug directly from the manufacturer or the manufacturer's third-party logistics provider or exclusive distributor.

(11) Drug--Articles recognized in the official United States Pharmacopoeia National Formulary, or any supplement to it, articles designated or intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals, articles, other than food, intended to affect the structure or any function of the body of man or other animals, and articles intended for use as a component of any such article. The term does not include devices or their components, parts, or accessories. A food for which a claim is made in accordance with the Federal Act, §403(r), and for which the claim is approved by the U.S. Food and Drug Administration, is not a drug solely because the label or labeling contains such a claim.

(12) Emergency medical reasons--Includes transfers of a prescription drug between a wholesale distributor or pharmacy to alleviate a temporary shortage of a prescription drug arising from delays in or interruption of regular distribution schedules; sales to nearby emergency medical services, i.e., ambulance companies and firefighting organizations in the same state or same marketing or service area, or nearby licensed practitioners of drugs for use in the treatment of acutely ill or injured persons; provision of minimal emergency supplies of drugs to nearby nursing homes for use in emergencies or during hours of the day when necessary drugs cannot be obtained; and transfers of prescription drugs by a retail pharmacy to alleviate a temporary shortage.

(13) Federal Act--Federal Food, Drug, and Cosmetic Act, 21 United States Code (U.S.C.), §301, et seq., as amended.

(14) Flea market--A location at which booths or similar spaces are rented or otherwise made available temporarily to two or more persons and at which the persons offer tangible personal property for sale.

(15) Labeling--All labels and other written, printed, or graphic matter:

(A) upon any drug or any of its containers or wrappers; or

(B) accompanying such drug.

(16) Manufacturer--A person who manufactures, prepares, propagates, compounds, processes, packages, or repackages prescription drugs, or a person who changes the container, wrapper, or labeling of any prescription drug package. A person licensed or approved by the United States Food and Drug Administration to engage in the manufacture of drugs or devices, consistent with the federal agency's definition of "manufacturer" under the agency's regulations and guidances implementing the Prescription Drug Marketing Act of 1987 (Pub. L. No. 100 - 293). The term does not include a pharmacist engaged in compounding that is done within the practice of pharmacy and pursuant to a prescription drug order or initiative from a practitioner for a patient or prepackaging that is done in accordance with Occupations Code, §562.154.

(17) Manufacturer's exclusive distributor--A person who holds a wholesale distributor license under this subchapter, who contracts with a manufacturer to provide or coordinate warehousing, distribution, or other services on behalf of the manufacturer, and who takes title to, but does not have general responsibility to direct the sale or disposition of, the manufacturer's prescription drug. A manufacturer's exclusive distributor must be an authorized distributor of record to be considered part of the normal distribution channel.

(18) Misbranded drug--Has the meaning specified in the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, §431.112.

(19) Nonprescription drug--Any drug that is not a prescription drug.

(20) Normal distribution channel--A chain of custody for a prescription drug, either directly or by drop shipment, from the manufacturer of the prescription drug, the manufacturer to the manufacturer's co-licensed product partner, the manufacturer to the manufacturer's third-party logistics provider, or the manufacturer to the manufacturer's exclusive distributor, to:

(A) a pharmacy to:

(i) a patient; or

(ii) another designated person authorized by law to dispense or administer the drug to a patient;

(B) an authorized distributor of record to:

(i) a pharmacy to a patient; or

(ii) another designated person authorized by law to dispense or administer the drug to a patient;

(C) an authorized distributor of record to a wholesale distributor licensed under this subchapter to another designated person authorized by law to administer the drug to a patient;

(D) an authorized distributor of record to a pharmacy warehouse to the pharmacy warehouse's intracompany pharmacy;

(E) a pharmacy warehouse to the pharmacy warehouse's intracompany pharmacy or another designated person authorized by law to dispense or administer the drug to a patient;

(F) a person authorized by law to prescribe a prescription drug that by law may be administered only under the supervision of the prescriber; or

(G) an authorized distributor of record to one other authorized distributor of record to a licensed practitioner for office use.

(21) Person--An individual, corporation, business trust, estate, trust, partnership, association, or any other public or private legal entity.

(22) Pharmacy warehouse--A location for which a person holds a wholesale drug distribution license under this subchapter, that serves as a central warehouse for drugs or devices, and from which intracompany sales or transfers of drugs or devices are made to a group of pharmacies under common ownership and control.

(23) Prescription drug--Any drug (including any biological product, except for blood and blood components intended for transfusion or biological products that are also medical devices) required by Federal law (including Federal regulation) to be dispensed only by a prescription, including finished dosage forms and bulk drug substances subject to the Federal Act, §503(b).

(24) Repackage--Repackaging or otherwise changing the container, wrapper, or labeling of a drug to further the distribution of a prescription drug. The term does not include repackaging by a pharmacist to dispense a drug to a patient or prepackaging in accordance with Occupations Code, §562.154.

(25) Repackager--A person who engages in repackaging.

(26) Third-party logistics provider--A person who holds a wholesale distributor license under this subchapter, who contracts with a prescription drug manufacturer to provide or coordinate warehousing, distribution, or other services on behalf of the manufacturer, and who does not take title to the prescription drug or have general responsibility to direct the prescription drug's sale or disposition. A third-party logistics provider must be an authorized distributor of record to be considered part of the normal distribution channel.

(27) Verification--A person who is engaged in the wholesale distribution of a prescription drug, and who is in possession of a pedigree for a prescription drug shall, before distributing the prescription drug, authenticate and certify, in accordance with Texas Food, Drug, and Cosmetic Act, Health and Safety Code, §431.412 and §431.413 and §229.429(f)(3)(G) of this title, that each transaction listed on the pedigree has occurred.

(28) Wholesale distribution--Distribution of prescription drugs to a person other than a consumer or patient. The term does not include:

(A) intracompany sales of prescription drugs, which means transactions or transfers of prescription drugs between a division, subsidiary, parent, or affiliated or related company that is under common ownership and control or any transaction or transfer between co-license holders of a co-licensed product;

(B) the sale, purchase, trade, or transfer of prescription drugs or the offer to sell, purchase, trade, or transfer a prescription drug for emergency medical reasons including a transfer of a prescription drug by a retail pharmacy to another retail pharmacy to alleviate a temporary shortage;

(C) the distribution of prescription drug samples by a representative of a manufacturer;

(D) the return of drugs by a hospital, health care entity, or charitable institution in accordance with 21 CFR, §203.23;

(E) the sale of reasonable quantities by a retail pharmacy of a prescription drug to a licensed practitioner for office use;

(F) the sale, purchase, or trade of a drug, an offer to sell, purchase, or trade a drug, or the dispensing of a drug under a prescription;

(G) the sale, transfer, merger, or consolidation of all or part of the business of a pharmacy from or with another pharmacy, whether accomplished as a purchase and sale of stock or business assets;

(H) the delivery of, or offer to deliver, a prescription drug by a common carrier solely in the common carrier's usual course of business of transporting prescription drugs, if the common carrier does not store, warehouse, or take legal ownership of the prescription drug;

(I) the sale or transfer from a retail pharmacy or pharmacy warehouse of expired, damaged, returned, or recalled prescription drugs to the original manufacturer or to a third-party returns processor in accordance with the procedures set out in Title 21, Code of Federal Regulations, §203.23(a)(1) - (5) for other returns;

(J) the purchase or other acquisition by a hospital or other health care entity that is a member of a group purchasing organization of a drug for its own use from the group purchasing organization or from other hospitals or health care entities that are members of such organizations;

(K) the sale, purchase, or trade of a drug or an offer to sell, purchase, or trade a drug by a charitable organization described in §501(c)(3) of the Internal Revenue Code of 1954 to a nonprofit affiliate of the organization to the extent otherwise permitted by law;

(L) the sale, purchase, or trade of a drug or an offer to sell, purchase, or trade a drug among hospitals or other health care entities that are under common control; for purposes of this subchapter, common control means the power to direct or cause the direction of the management and policies of a person or an organization, whether by ownership of stock, voting rights, by contract, or otherwise; or

(M) the sale, purchase, or trade of blood and blood components intended for transfusion.

(29) Wholesale distributor--A person engaged in the wholesale distribution of prescription drugs, including, but not limited to, a manufacturer, repackager, own-label distributor, private-label distributor, jobber, broker, manufacturer warehouse, distributor warehouse, or other warehouse, manufacturer's exclusive distributor, authorized distributor of record, drug wholesaler or distributor, independent wholesale drug trader, specialty wholesale distributor, third-party logistics provider, retail pharmacy that conducts wholesale distribution, and pharmacy warehouse that conducts wholesale distribution.

§229.429. Minimum Standards for Licensure.

(a) General requirements. All persons engaged in the wholesale distribution of prescription drugs must comply with the applicable minimum standards in this section, in addition to the statutory requirements contained in the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431 (Act) and those requirements in §229.420 of this title (relating to Applicable Laws and Regulations). For the purpose of this section, the policies described in the United States Food and Drug Administration's (FDA's) Compliance Policy Guides as they apply to prescription drugs shall be the policies of the department.

(b) Federal establishment registration and drug listing. All persons who operate as prescription drug manufacturers in Texas shall meet the requirements in 21 Code of Federal Regulations (CFR), Part 207, titled "Registration of Producers of Drugs and Listing of Drugs in Commercial Distribution." New prescription drugs offered for sale by wholesale distributors shall have met, if applicable, the requirements of 21 CFR, Part 314, titled "Applications for FDA Approval to Market a New Drug."

(c) Good manufacturing practices. Manufacturers of prescription drug products shall be in compliance with the applicable requirements in 21 CFR, Part 210, titled "Current Good Manufacturing Practice in Manufacturing, Processing, Packing, or Holding of Drugs"; 21 CFR, Part 211, titled "Current Good Manufacturing Practice for Finished Pharmaceuticals; General"; 21 CFR, Part 225, titled "Current Good Manufacturing Practice for Medicated Feeds"; and 21 CFR, Part 226, titled "Current Good Manufacturing Practice for Type A Medicated Articles." The regulations in these parts govern the methods used in, and the facilities or controls used for, the manufacture, processing, packing, or holding of a drug to assure that each drug meets the requirements of the Federal Act as to safety, and has the identity and strength and meets the quality and purity characteristics that it purports or is represented to possess.

(d) Buildings and facilities.

(1) All manufacturing, processing, packing, or holding of drugs by prescription drug manufacturers shall take place in buildings and facilities described in subsection (c) of this section.

(2) No manufacturing, processing, packing, or holding of prescription drugs shall be conducted in any personal residence.

(3) No sale of prescription drugs shall be conducted in any flea market.

(4) Any place of business used by a wholesale distributor of prescription drugs who is not a manufacturer to store, warehouse, hold, offer, transport, or display drugs shall:

(A) be in compliance with the requirements adopted in §229.420(a)(14) of this title;

(B) be of suitable size and construction to facilitate cleaning, maintenance, and proper operations;

(C) have storage areas designed to provide adequate lighting, ventilation, temperature, sanitation, humidity, and space;

(D) be maintained in a clean and orderly condition;

(E) be free from infestation by insects, rodents, birds, or vermin of any kind; and

(F) have a quarantine area for storage of drugs that are outdated, damaged, deteriorated, misbranded, or adulterated.

(e) Storage of prescription drugs. All prescription drugs stored by wholesale distributors shall be held at appropriate temperatures and under appropriate conditions in accordance with requirements, if any, in the labeling of such drugs.

(f) Minimum restrictions on transactions.

(1) Returns.

(A) A wholesale distributor must receive prescription drug returns or exchanges from a pharmacy or pharmacy warehouse in accordance with the terms and conditions of the agreement between the wholesale distributor and the pharmacy or pharmacy warehouse. An expired, damaged, recalled, or otherwise nonsalable prescription drug that is returned to the wholesale distributor may be distributed by the

wholesale distributor only to either the original manufacturer or a third party returns processor. The returns or exchanges, salable or otherwise, received by the wholesale distributor as provided by this subsection, including any redistribution of returns or exchanges by the wholesale distributor, are not subject to the pedigree requirement under Health and Safety Code, §431.412, if the returns or exchanges are exempt from pedigree under:

(i) §503, Prescription Drug Marketing Act of 1987 (21 U.S.C. §353(c)(3)(B));

(ii) the regulations adopted by the Secretary of the U.S. Department of Health and Human Services to administer and enforce that Act; or

(iii) the interpretations of that Act set out in the compliance policy guide of the United States Food and Drug Administration.

(B) Each wholesale distributor and pharmacy shall administer the process of drug returns and exchanges to ensure that the process is secure and does not permit the entry of adulterated or counterfeit drugs into the distribution channel.

(C) Notwithstanding any provision of state or federal law to the contrary, a person that has not otherwise been required to obtain a wholesale license under this subchapter and that is a pharmacy engaging in the sale or transfer of expired, damaged, returned, or recalled prescription drugs to the originating wholesale distributor or manufacturer and pursuant to federal statute, rules, and regulations, including the United States Food and Drug Administration's applicable guidances implementing the Prescription Drug Marketing Act of 1987 (Pub. L. No. 100 - 293), is exempt from wholesale licensure requirements under this subchapter.

(D) All other returns must comply with the requirements of Title 21, Code of Federal Regulations, §203.23(a)(1) - (5).

(2) Distributions. A manufacturer or wholesale distributor may distribute prescription drugs only to a person licensed under this subchapter, or the appropriate state licensing authorities, if an out-of-state wholesaler or retailer, or authorized by federal law to receive the drug. Before furnishing prescription drugs to a person not known to the manufacturer or wholesale distributor, the manufacturer or wholesale distributor shall verify that the person is legally authorized by the department or the appropriate state licensing authority to receive the prescription drugs or authorized by federal law to receive the drugs. Wholesale distributors physically located and conducting operations in another state shall verify, prior to purchasing or receiving product, that the suppliers of drugs are licensed under this subchapter and physically located in Texas; and, shall notify the department of unlicensed wholesale distributors.

(3) Pedigree.

(A) A person, who is engaged in the wholesale distribution of a prescription drug, including a repackager but excluding the original manufacturer, shall provide a pedigree for each prescription drug for human consumption that leaves or at any time has left the normal distribution channel and is sold, traded, or transferred to any other person.

(B) A retail pharmacy or pharmacy warehouse is required to comply with this section only if the pharmacy or warehouse engages in the wholesale distribution of a prescription drug.

(C) A person who is engaged in the wholesale distribution of a prescription drug, including a repackager, but excluding the original manufacturer of the finished form of a prescription drug, and who is in possession of a pedigree for a prescription drug shall verify before distributing the prescription drug that each transaction listed on the pedigree has occurred.

(D) A pedigree must include all necessary identifying information concerning each sale in the product's chain of distribution from the manufacturer, through acquisition and sale by a wholesale distributor or repackager, until final sale to a pharmacy or other person dispensing or administering the drug. At a minimum, the chain of distribution information must include:

(i) the name, address, telephone number, and, if available, the e-mail address of each person who owns the prescription drug and each wholesale distributor of the prescription drug;

(ii) the name and address of each location from which the product was shipped, if different from the owner's name and address;

(iii) the transaction dates; and

(iv) certification that each recipient has authenticated the pedigree.

(E) The pedigree must include, at a minimum, the:

(i) name of the prescription drug;

(ii) dosage form and strength of the prescription drug;

(iii) size of the container;

(iv) number of containers;

(v) lot number of the prescription drug; and

(vi) name of the manufacturer of the finished dosage form.

(F) Each pedigree statement must be:

(i) maintained by the purchaser and the wholesale distributor for at least three years; and

(ii) available for inspection and photocopying not later than the second business day after the date a request is submitted by the department or a peace officer in this state.

(G) Verification procedures.

(i) Each transaction listed on the pedigree must be affirmatively authenticated prior to any wholesale distribution of a prescription drug.

(ii) A person who is engaged in the wholesale distribution of a prescription drug, and who is in possession of a pedigree for a prescription drug shall certify, using the following methods, that each transaction listed on the pedigree has occurred.

(I) Invoice confirmation. Receipt of an invoice (or shipping document) from the seller to the purchaser, which may have the prices redacted. Documentation requirements include at a minimum a copy of the invoice or shipping document. If this method is used to authenticate a pedigree, the wholesaler shall review the document received for signs of tampering, incompleteness, or inconsistency with other invoices or shipping documents from that manufacturer or wholesaler, and shall randomly verify the authenticity of the invoice or shipping document with the seller or shipping point reflected on that document using one of the methods in the subsections below. Each wholesaler shall establish policies and procedures for the random verification of the authenticity of the invoices or shipping documents according to statistically sound standards. Each wholesaler shall establish policies and procedures for verification with those wholesalers in the distribution chain with which the wholesaler performing the authenti-

cation does not have an established prescription drug vendor relationship.

(II) Telephonic confirmation. Documentation requirements include a signed statement by the person placing the telephone call identifying the person's name and position title representing the seller who provides the information, the date the information was provided, and verification of the sales transaction between the parties, including verification of the date of the transaction and the quantity of prescription drugs involved in the transaction.

(III) Electronic mail confirmation. Documentation requirements include a copy of the e-mail that identifies the person's name and position title representing the seller who provides the information, the date the information was provided, and verification of the sales transaction between the parties, including verification of the date of the transaction and quantity of prescription drugs involved in the transaction.

(IV) Electronic web-based confirmation. Verification of the transaction per a web-based system established by the seller or an independent person that is secure from intentional or unintentional tampering or manipulation to conceal an accurate and complete history of the prescription drug transaction(s). Documentation requirements include a written representation from the seller or independent person that the seller or independent person, as applicable, is responsible for the information included on the website and has adequate security on the information posted to prevent unauthorized tampering, manipulation, or modification of the information and a copy of the dated website page that confirms the sales transaction between the parties, including the date of the transaction and quantity of prescription drugs involved in the transaction.

(V) Notarized copy confirmation. Receipt of a legible and unaltered copy of a previous transaction's pedigree paper that had been signed under oath at the time of the previous transaction to support the transaction to which the pedigree paper relates. If this method is used to authenticate a pedigree, the wholesaler shall review the document received for signs of tampering, incompleteness, or inconsistency, and shall randomly verify the authenticity of pedigrees using one of the methods in the this subparagraph. Each wholesaler shall establish policies and procedures for the random verification of the authenticity of these copies of pedigree according to statistically sound standards.

(VI) Exclusive purchasing. A wholesale distributor may use a written agreement between the wholesale distributor and an authorized distributor of record that requires that all prescription drugs distributed to the wholesale distributor by the authorized distributor of record must be purchased by the authorized distributor of record from the manufacturer. If this method is used to authenticate a pedigree, the wholesale distributor shall establish policies and procedures for the random verification of the authenticity of the pedigrees that disclose the authorized distributor of record purchased the prescription drug from the manufacturer according to statistically sound standards.

(VII) Other methods. Any other method approved by the department.

(4) Premises. Prescription drugs distributed by a manufacturer or wholesale distributor may be delivered only to the premises listed on the license, except as listed in paragraph (5) of this subsection. A manufacturer or wholesale distributor may distribute prescription drugs to an authorized person or agent of that person at the premises of the manufacturer or wholesale distributor if:

(A) the identity and authorization of the recipient is properly established; and

(B) delivery is made only to meet the immediate needs of a particular patient of the authorized person.

(5) Delivery to hospital pharmacies. Prescription drugs may be distributed to a hospital pharmacy receiving area if a pharmacist or an authorized receiving person signs, at the time of delivery, a receipt showing the type and quantity of the prescription drug received. Any discrepancy between the receipt and the type and quantity of the prescription drug actually received shall be reported to the delivering manufacturer or wholesale distributor not later than the next business day after the date of delivery to the pharmacy receiving area.

(g) Prescription drug labeling. Prescription drugs sold by wholesale distributors shall meet the labeling requirements of the Act and those adopted in §229.420(a) of this title.

(h) Prescription drugs that are combination products. Any prescription drug that is a combination product as described in §229.424(c) of this title (relating to Licensure Requirements) is also subject to the applicable requirements in Subchapter X of this chapter (relating to Licensing of Device Distributors and Manufacturers).

(i) Prescription drugs that are also cosmetics. Any prescription drug that is also a cosmetic or component thereof is also subject to the applicable requirements of Subchapter D of this chapter (relating to Regulation of Cosmetics).

(j) Nonprescription drugs. Nonprescription drugs offered for sale by wholesale distributors of prescription drugs shall be in compliance with the applicable requirements of Subchapter O of this chapter (relating to Licensing of Wholesale Distributors of Nonprescription Drugs--Including Good Manufacturing Practices).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Lisa Hernandez
General Counsel
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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 21. TRADE PRACTICES
SUBCHAPTER RR. STANDARD PROOF OF HEALTH INSURANCE FOR MEDICAL BENEFITS FOR INJURIES INCURRED AS A RESULT OF A MOTORCYCLE ACCIDENT

28 TAC §21.5201

The Commissioner of Insurance (Commissioner) adopts new Subchapter RR, §21.5201, concerning standard proof of health insurance for medical benefits for injuries incurred as a result

of a motorcycle accident. The new section is adopted with changes to the proposed text published in the September 17, 2010, issue of the *Texas Register* (35 TexReg 8469).

REASONED JUSTIFICATION. This new section is necessary to implement SECTION 8(c) and (c-2) of Senate Bill (SB) 1967, 81st Legislature, Regular Session, which amends the Transportation Code §661.003 and directs the Department to prescribe a standard proof of health insurance for issuance to persons who are at least 21 years of age and covered by a health insurance plan for medical benefits for injuries incurred as a result of an accident while operating or riding a motorcycle. One of the purposes of SB 1967 is to amend current law relating to the safe operation of motorcycles to provide consistency regarding the enforcement of Transportation Code §661.003 (Offenses Relating to Not Wearing Protective Headgear). Prior to the enactment of SB 1967, it was an offense under the Transportation Code §661.003 to drive or ride on a motorcycle without a helmet unless the person was 21 years of age and had completed a motorcycle safety course or had health insurance. However, Texas statutes did not require all motorcyclists or the public to complete any motorcycle safety training. (TEXAS STATE SENATE TRANSPORTATION AND HOMELAND SECURITY COMMITTEE, BILL ANALYSIS (ENROLLED), SB 1967, 81ST Leg., R.S. (Sept. 2, 2009)). In addition, the Insurance Code did not provide a standard of proof for the health insurance component of the two exceptions to the Transportation Code §661.003. SB 1967 SECTION 8(c-2) requires the Department to prescribe a standard proof of health insurance for issuance to persons who are at least 21 years of age and covered by a health insurance plan described by SB 1967 SECTION 8(c). The insurance exception to the Transportation Code §661.003 provides that the excepted person must be "covered by a health insurance plan providing the person with medical benefits for injuries incurred as a result of an accident while operating or riding on a motorcycle" to qualify for the exception.

On April 15, 2010, the Department posted an informal working draft of the proposed new subchapter on the Department's website and invited public comment. The Department held a meeting on April 29, 2010, to discuss the informal working draft with interested parties. The informal comment period ended on April 30, 2010, and the formal proposal included input from comments received regarding the informal working draft of the proposed new rule. The proposed new rule was formally published in the September 17, 2010, issue of the *Texas Register* (35 TexReg 8469). The Department did not receive any requests for a public hearing on the rule proposal. The Department did receive one comment regarding the removal of the word "paper" from proposed §21.5201(c)(2), and as a result of the comment, the Department has inserted the word "paper" into the text of §21.5201(c)(2), clarifying that the subsection was designed to allow for paper cards and reinstating the language of the subsection to the language posted in the informal working draft of the proposed new subchapter. None of the changes to the proposed text, either as a result of comments or as a result of necessary clarification, materially alter issues raised in the proposal, introduce new subject matter, or affect persons other than those previously on notice. Furthermore, none of the changes to the proposed text impose a more stringent requirement for compliance than the proposed version. The changes provide a more lenient and more flexible requirement that is beneficial to both the industry and consumers.

New §21.5201 is not applicable to personal injury protection (PIP) and medical payment (Med Pay) coverages. The Transportation Code §661.003(c) provides that a person covered by a "health insurance plan" providing the person with medical benefits for injuries incurred as a result of an accident while operating or riding a motorcycle is exempted from committing the offense of not wearing protective headgear. Section 661.003(i) defines "health insurance plan" as an "individual, group, blanket, or franchise insurance policy, insurance agreement, evidence of coverage, group hospital services contract, health maintenance organization membership, or employee benefit plan that provides benefits for health care services or for medical or surgical expenses incurred as a result of an accident." PIP and Med Pay coverages are not considered health insurance plans under the Insurance Code. For instance, §1952.151 of the Insurance Code states that "personal injury protection" coverage "consists of provisions of an automobile liability insurance policy that provide for payment . . . for expenses that arise from an accident. . . ." Section 2251.202 of the Insurance Code requires the Commissioner to publish a standard rate index of rates "for each of the following coverages under a personal automobile insurance policy," including "personal injury protection" and "medical payments." Finally, a large number of other sections of the Insurance Code distinguish between coverage under a health benefit plan and medical payment insurance coverage under an automobile insurance policy, including §§544.152, 546.003, 846.001, 1274.001, 1352.002, 1357.003, 1357.053, 1358.003, 1360.003, 1366.054, and 1501.002. Since the term "health insurance plan" under the Transportation Code does not specifically include automobile coverages providing for medical benefits, and because the Insurance Code does not treat PIP or Med Pay as falling within the general scope of health insurance, such coverages will not qualify for the exemption from the offense found in the Transportation Code.

HOW THE SECTION WILL FUNCTION. New §21.5201 ensures that a standard proof of health insurance exists to implement an exception to the application of the Transportation Code §661.003(a) or (b), which provides that it is an offense for a person to not wear protective headgear while operating or riding as a passenger on a motorcycle on a public street or highway. New §21.5201(a)(1) provides that the subchapter is applicable to an individual, group, blanket, or franchise insurance policy, insurance agreement, health maintenance organization evidence of coverage, group hospital services contract, or employee benefit plan that provides benefits for health care services or for medical or surgical expenses incurred as a result of an accident while operating or riding a motorcycle. New §21.5201(a)(2) expressly provides that the subchapter is not applicable to credit-only coverage, disability coverage, specified disease coverage, long-term care coverage, dental or vision-only coverage, single-service health maintenance organization coverage, accidental death and dismemberment coverage, hospital indemnity coverage, workers' compensation coverage, or medical payments or personal injury protection coverage. New §21.5201(b) provides that upon request, a health insurance plan shall issue a standard proof of health insurance coverage identifying a person who is at least 21 years of age and covered by a health insurance plan for medical benefits for injuries incurred as a result of an accident while operating or riding a motorcycle, unless the plan already issues customary identification cards that include the words "MOTORCYCLE HEALTH" on the face of the card. New §21.5201(c) provides two alternative ways in which a health insurance plan can remain in compliance with the subsection. New §21.5201(c)(1) provides that a health insurance plan may comply by issuing its customary identification card with the words "MOTORCYCLE HEALTH" in all capital

letters, printed in at least 8-point boldface font, and prominently placed on the card. New §21.5201(c)(2) provides that a health insurance plan may comply by issuing a paper card, separate from its customary card, titled "Motorcycle Health: Standard Proof of Health Insurance". The separate paper card must contain the heading "Motorcycle Health: Standard Proof of Health Insurance," the carrier logo, the carrier name, the name of the enrollee, insured, or dependent of the enrollee or insured, the policy number, and a statement that the enrollee, insured, or dependent of the enrollee or insured is covered by a health insurance plan that provides medical benefits for injuries incurred as a result of an accident while operating or riding a motorcycle. All text printed on the separate paper card shall appear in upper and lower case, using at least 12-point boldface type for the heading and at least 10-point regular type for the text body.

SUMMARY OF COMMENTS AND AGENCY RESPONSE.

Comment: One commenter noted that the published proposed language for §21.5201(c)(2) differed from the language in both the Commissioner's Bulletin B-0037-09, which allows for use of other forms such as a letter on company letterhead, and the TDI informal draft rules, which allowed for use of a "paper card". The proposed language as published omitted the word "paper" and merely provided that a health plan may opt to comply with provisions requiring issuance of a standard proof of health insurance by issuing a ". . .card, separate from its customary identification card. . . ." This commenter noted that the omission of the word "paper" from the text of the rule eliminates several alternate compliance approaches currently in use by insurers. For example, some health plans are utilizing a method for securing the required information by allowing the insured to call the customer service department to request and receive a "proof of coverage" letter. Others have set up mechanisms to obtain such "proof of coverage" through their member website. These alternative mechanisms offer health plans a less costly option and also allow insureds to attain the standard proof more easily.

Agency Response: The Department agrees and has inserted the word "paper" into the text of §21.5201(c)(2) by placing the word "paper" in front of all instances of the word "card". These changes will clarify that carriers are permitted to utilize company letterhead in providing the required information in a card format.

NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL.

For with changes: Texas Association of Health Plans.

STATUTORY AUTHORITY. The new section is adopted under the Transportation Code §661.003(c) and (c-2) and the Insurance Code §36.001. The Transportation Code §661.003(c) provides that it is an exception to the application of §661.003(a) or (b), which provides that it is an offense for a person to not wear protective headgear while operating or riding as a passenger on a motorcycle on a public street or highway, if a person is at least 21 years old and is covered by a health insurance plan providing the person with medical benefits for injuries incurred as a result of an accident while operating or riding on a motorcycle. The Transportation Code §661.003(c-2) provides that the Department of Insurance shall prescribe a standard of proof of health insurance for issuance to persons who are at least 21 years of age and covered by a health insurance plan described by §661.003(c). The Insurance Code §36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

§21.5201. Identification Cards - Health Coverage for Motorcycle Injuries.

(a) Applicability.

(1) This subchapter is applicable to an individual, group, blanket, or franchise insurance policy, insurance agreement, health maintenance organization evidence of coverage, group hospital services contract, or employee benefit plan that provides benefits for health care services or for medical or surgical expenses incurred as a result of an accident while operating or riding on a motorcycle.

(2) This subchapter is not applicable to:

(A) credit-only coverage;

(B) disability coverage;

(C) specified disease coverage;

(D) long-term care coverage;

(E) dental or vision-only coverage;

(F) single-service health maintenance organization coverage;

(G) accidental death and dismemberment coverage;

(H) hospital indemnity coverage;

(I) workers' compensation coverage; or

(J) medical payments or personal injury protection coverage provided under an automobile policy.

(b) Standard Proof of Health Insurance. Upon request, a health insurance plan, as defined by the Transportation Code §661.003(i), shall issue a standard proof of health insurance coverage that satisfies the content requirements under subsection (c) of this section and identifies a person who is at least 21 years of age and covered by the health insurance plan for medical benefits for injuries incurred as a result of an accident while operating or riding on a motorcycle. A request can be made by a person who is an enrollee or an insured of the health insurance plan or who is a dependent of an enrollee or insured of the health insurance plan.

(c) Contents of Standard Proof of Health Insurance. A health insurance plan shall issue the standard proof of health insurance coverage described by subsection (b) of this section through one of the methods set forth in either paragraph (1) or paragraph (2) of this subsection:

(1) The health insurance plan may elect to add to its customary identification card the words "MOTORCYCLE HEALTH." By including the words "MOTORCYCLE HEALTH" on its customary identification card, a health insurance plan affirms that the person named on the card is covered by a health insurance plan that provides medical benefits for injuries incurred as a result of an accident while operating or riding on a motorcycle, as addressed by the Transportation Code §661.003(c). The words "MOTORCYCLE HEALTH" must be:

(A) printed in all capital letters;

(B) printed in at least 8-point boldface font; and

(C) located in a prominent place on the card.

(2) The health insurance plan may elect to issue a paper card, separate from its customary identification card, titled "Motorcycle Health: Standard Proof of Health Insurance."

(A) The separate paper card must contain at least the following:

(i) a heading that includes only the words "Motorcycle Health: Standard Proof of Health Insurance;"

(ii) the carrier logo;

(iii) the carrier name;

(iv) the name of the enrollee, insured, or dependent of the enrollee or insured;

(v) the policy number; and

(vi) the statement: *"{name of enrollee, insured, or dependent of the enrollee or insured}* is covered by a health insurance plan that provides medical benefits for injuries incurred as a result of an accident while operating or riding on a motorcycle, as addressed by the Transportation Code §661.003(c)."

(B) All text printed on the separate paper card shall appear in upper and lower case as appropriate.

(C) The text body shall appear in at least 10 point regular type.

(D) The heading shall appear in at least 12 point boldface type.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 16, 2010.

TRD-201006537
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: December 6, 2010
Proposal publication date: September 17, 2010
For further information, please call: (512) 463-6327

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CHAPTER 26. SMALL EMPLOYER HEALTH INSURANCE REGULATIONS

The Commissioner of Insurance (Commissioner) adopts amendments to §26.7 and §26.304, concerning small and large employer health insurance regulations. The amendments provide that an employee who is eligible for coverage under a large or small employer health benefit plan and who is the spouse of another employee covered under the plan may elect whether to be treated under the plan as an employee or the dependent of the other employee. The amendments are adopted without changes to the proposed text published in the September 17, 2010, issue of the *Texas Register* (35 TexReg 8473).

REASONED JUSTIFICATION. The amendments are necessary to: (1) provide flexibility for coverage options in situations where two married individuals eligible for coverage under a large or small employer health benefit plan are working for the same employer; and (2) implement provisions of House Bill (HB) 407, 79th Legislature, Regular Session, effective June 18, 2005, relating to coverage for school district employees where two married individuals eligible for coverage under a large or small employer health benefit plan are working for the same school district. HB 407 amended the Insurance Code Chapter 1501 to add §1501.0095, which provides that a school district employee who is eligible for coverage under a large or small employer health benefit plan providing coverage to the school district's employees and who is the spouse of another school district employee covered under the plan may elect whether to be treated under the plan as an employee or the dependent of the other employee.

The amendments provide flexibility for coverage options for employees in situations where two married individuals eligible for coverage under a large or small employer health benefit plan are working for the same employer. Representatives of insurance agencies and benefits services firms provided information to the Department about the potential cost-reduction benefits of providing such flexibility for coverage options in situations where a family-coverage option for a particular employer group product or plan is more cost favorable than an employee-only plus employee-and-children coverage option. The amendments facilitate the opportunity for the married individuals eligible for coverage under the plan to choose between or among coverage options instead of being restricted to each being covered as an employee.

On April 15, 2010, the Department posted on its website, for informal comment, the draft rule text and cost note estimates. On April 29, 2010, the Department held a public meeting to receive oral informal comments on the draft rule text and the note of estimated costs.

The statement of estimated costs was further considered as a result of comments received during the informal posting. As indicated in the Public Benefit/Cost Note portion of the published proposal, however, the Department did not receive information adding to or conflicting with its cost estimates.

Moreover, comments on the proposed text of the rule received during the informal posting or at the public meeting resulted in a clarifying addition to the text as informally posted, to provide that an election by a spouse to be treated as a dependent under the proposed amended rule does not impact the individual's status as an eligible employee for any other purpose under the Insurance Code Chapter 1501, except that such individual may be treated as a dependent for purposes of employer premium contributions.

The proposed amendments were formally published in the September 17, 2010, issue of the *Texas Register* (35 TexReg 8473). The Department did not receive any comments or requests for public hearing on the published proposal.

HOW THE SECTIONS WILL FUNCTION. The amendments provide that an employee eligible for coverage under a large or small employer health benefit plan and who is the spouse of another employee covered under the plan shall be given an opportunity to elect whether to be treated as an employee or as the dependent of the other employee.

The amendments to §26.7 set forth that a small employer carrier must provide married eligible employees of the same employer the option to elect to have one spouse be treated under a small employer health benefit plan as an employee or alternatively as the dependent of the other employee. The amendments also provide that an election by a spouse to be treated as a dependent under the amended rule does not impact the individual's status as an eligible employee for any other purpose under the Insurance Code Chapter 1501, except that such individual may be treated as a dependent for purposes of employer premium contributions.

The amendments to §26.304 set forth that a large employer carrier must provide married eligible employees of the same employer the option to elect to have one spouse be treated under a large employer health benefit plan as an employee or alternatively as the dependent of the other employee. The amendments also provide that an election by a spouse to be treated as a dependent under the amended rule does not impact the individual's status as an eligible employee for any other purpose under the Insurance Code Chapter 1501, except that such individual may be treated as a dependent for purposes of employer premium contributions.

The amendments apply to large or small employer health benefit plans for plan years beginning on or after the effective date of the amendments as adopted.

SUMMARY OF COMMENTS AND AGENCY RESPONSE. The Department did not receive any comments on the published proposal.

SUBCHAPTER A. SMALL EMPLOYER HEALTH INSURANCE PORTABILITY AND AVAILABILITY ACT REGULATIONS

28 TAC §26.7

STATUTORY AUTHORITY. The amendments are adopted under the Insurance Code Chapter 1501 and §36.001. Chapter 1501 implements provisions regarding small and large employers which were necessary to comply with the federal requirements contained in the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA). Section 1501.010 requires the Commissioner to adopt rules necessary to implement the Chapter 1501, and to meet the minimum requirements of federal law, including regulations, which for small and large employer health carriers are contained in HIPAA and in regulations adopted by federal agencies to implement HIPAA. Section 1501.0095 requires the Commissioner to adopt rules to govern the manner in which an election under the section must be made. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 16, 2010.

TRD-201006538
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: December 6, 2010
Proposal publication date: September 17, 2010
For further information, please call: (512) 463-6327

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SUBCHAPTER C. LARGE EMPLOYER HEALTH INSURANCE PORTABILITY AND AVAILABILITY ACT REGULATION

28 TAC §26.304

STATUTORY AUTHORITY. The amendments are adopted under the Insurance Code Chapter 1501 and §36.001. Chapter 1501 implements provisions regarding small and large employers which were necessary to comply with the federal requirements contained in the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA). Section 1501.010 requires the Commissioner to adopt rules necessary to implement the Chapter 1501, and to meet the minimum requirements of federal law, including regulations, which for small and large employer health carriers are contained in HIPAA and in regulations adopted by federal agencies to implement HIPAA. Section 1501.0095 requires the Commissioner to adopt rules to govern the manner in which an election under the section must be made. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 16, 2010.

TRD-201006539
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: December 6, 2010
Proposal publication date: September 17, 2010
For further information, please call: (512) 463-6327

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 17. TEXAS STATE SOIL AND WATER CONSERVATION BOARD

CHAPTER 517. FINANCIAL ASSISTANCE

SUBCHAPTER B. COST-SHARE ASSISTANCE FOR BRUSH CONTROL

31 TAC §517.33

The Texas State Soil and Water Conservation Board (State Board or agency) adopts an amendment to §517.33, concerning Contracts for Cost-share, without changes to the proposed text as published in the October 1, 2010, issue of the *Texas Register* (35 TexReg 8899). The adopted text specifies that follow-up brush control will now be required to be carried out as agreed to in an eligible persons brush control plan. This is accomplished by deleting old language that did specify brush control follow-up was subject to funding availability.

Specifically, the adopted text changes §517.33(a)(4)(A), relating to contracts for cost-share, by deleting language that specifies requirements for follow-up brush control are subject to funding availability and inserting language that states requirements for

follow-up brush control will be carried out as agreed to in the eligible person's brush control plan.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Agriculture Code of Texas, Title 7, Chapter 201, §201.020, which authorizes the State Board to adopt rules that are necessary for the performance of its functions under the Agriculture Code and Chapter 203, §203.012, which authorized the agency to adopt reasonable rules that are necessary to carry out the provisions of that chapter.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 19, 2010.

TRD-201006629
Mel Davis
Special Projects Coordinator
Texas State Soil and Water Conservation Board
Effective date: December 9, 2010
Proposal publication date: October 1, 2010
For further information, please call: (254) 773-2250 x252

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 3. TEXAS YOUTH COMMISSION

CHAPTER 99. GENERAL PROVISIONS
SUBCHAPTER C. MISCELLANEOUS

37 TAC §99.41

The Texas Youth Commission (TYC) adopts new §99.41, concerning Response to Ombudsman Reports, without changes to the proposed text as published in the September 24, 2010, issue of the *Texas Register* (35 TexReg 8715).

The new rule is adopted to comply with recently enacted legislation and enhance transparency concerning communications between TYC and the Office of Independent Ombudsman of the Texas Youth Commission. The rule establishes procedures for TYC to review and comment on certain types of reports issued by the Office of Independent Ombudsman. The rule also contains procedures for TYC to eliminate or expedite its review and comment process for reports that address serious or flagrant circumstances, as defined in Human Resources Code §64.055.

No comments were received regarding adoption of the rule.

The rule is adopted under: (1) Human Resources Code §61.034, which provides TYC with the authority to adopt rules appropriate to the proper accomplishment of its functions; and (2) Human Resources Code §64.058, which requires TYC to adopt rules to establish procedures for TYC to review and comment on reports of the Office of Independent Ombudsman.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 15, 2010.

TRD-201006535
CherylN K. Townsend
Executive Director
Texas Youth Commission
Effective date: December 6, 2010
Proposal publication date: September 24, 2010
For further information, please call: (512) 424-6014

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PART 9. TEXAS COMMISSION ON JAIL STANDARDS

CHAPTER 273. HEALTH SERVICES

37 TAC §273.5

The Commission on Jail Standards adopts an amendment to §273.5, concerning Mental Disabilities/Suicide Prevention Plan, to allow county jails to utilize either the CARE or CCQ check, without changes as published in the September 24, 2010, issue of the *Texas Register* (35 TexReg 8717).

This amendment is being adopted to allow a county to utilize either the CARE of CCQ check to determine if an inmate has ever received MHMR services.

This rule allows a county to utilize either the CARE or CCQ system check as both systems are currently available and approved for use.

No comments were received regarding the proposal.

The amendment is adopted under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 19, 2010.

TRD-201006621
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Effective date: December 9, 2010
Proposal publication date: September 24, 2010
For further information, please call: (512) 463-8236

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 27. TOLL PROJECTS

SUBCHAPTER G. OPERATION OF DEPARTMENT TOLL PROJECTS

43 TAC §27.82

The Texas Department of Transportation (department) adopts amendments to §27.82, concerning toll operations. The amendments to §27.82 are adopted without changes to the proposed text as published in the June 11, 2010, issue of the *Texas Register* (35 TexReg 5011) and will not be republished. The effective date of these amendments is March 1, 2011.

EXPLANATION OF ADOPTED AMENDMENTS

The department has operated toll roads in the state of Texas since January of 2006. The department's past experience and relationships with other toll authorities have provided the agency with insight into best practices that may result in more efficient management and operation of its toll systems. The amendments reflect the department's efforts to enhance operational efficiency and improve customer service.

Amendments to §27.82(c) remove the specific amounts listed for customer account fees and provide that those fees will be set by order of the Texas Transportation Commission (commission). In setting those fees, the commission will consider the cost of operations, including the estimated costs to the department for labor, materials, storage, and bank fees, as well as the requirements of project bond covenants. The amendments provide for two new categories of fees - an account maintenance fee and an account reactivation fee. The amendments also remove the requirement that the commission review customer account fees on an annual basis. These amendments add flexibility for the commission to review and adjust customer account fees as necessary to accommodate changes in the department's operational costs.

COMMENTS

No comments on the proposed amendments were received.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §228.057(d), which provides that the department may charge reasonable fees for administering electronic toll collection customer accounts.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 228.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 19, 2010.

TRD-201006618
Bob Jackson
General Counsel
Texas Department of Transportation
Effective date: March 1, 2011
Proposal publication date: June 11, 2010
For further information, please call: (512) 463-8683

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REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

Texas Optometry Board

Title 22, Part 14

The Texas Optometry Board files this notice of intention to review Texas Administrative Code, Title 22, Chapter 271, pursuant to the requirements of Texas Government Code §2001.039. This section requires all state agencies to review their rules every four years. After an assessment that the reasons for initially adopting the rules continue to exist, the agency's rules may be considered for readoption.

The agency has conducted a preliminary assessment of the following rules in Chapter 271 and has determined that the reasons for initially adopting the rules continue to exist: §271.1, Definitions; §271.2, Applications; §271.3, Jurisprudence Examination Administration; §271.5, Licensure Without Examination; §271.6, National Board Examination; and §271.7, Criminal History Evaluation Letters.

The agency invites comments from the public regarding whether the reasons for initially adopting these rules continue to exist. Comments on the proposal may be submitted to Chris Kloeris, Executive Director, Texas Optometry Board, 333 Guadalupe Street, Suite 2-420, Austin, Texas 78701-3942. The deadline for furnishing comments is thirty days after publication in the *Texas Register.*

TRD-201006566
Chris Kloeris
Executive Director
Texas Optometry Board
Filed: November 17, 2010

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The Texas Optometry Board files this notice of intention to review Texas Administrative Code, Title 22, Chapter 272, pursuant to the requirements of Texas Government Code §2001.039. This section requires all state agencies to review their rules every four years. After an assessment that the reasons for initially adopting the rules continue to exist, the agency's rules may be considered for readoption.

The agency has conducted a preliminary assessment of the following rules in Chapter 272 and has determined that the reasons for initially adopting the rules continue to exist: §272.1, Open Records; §272.2, Historically Underutilized Business; and §272.3, Bid and Purchasing Protest Procedures.

The agency invites comments from the public regarding whether the reasons for initially adopting these rules continue to exist. Comments on the proposal may be submitted to Chris Kloeris, Executive Director, Texas Optometry Board, 333 Guadalupe Street, Suite 2-420, Austin, Texas 78701-3942. The deadline for furnishing comments is thirty days after publication in the *Texas Register.*

TRD-201006585
Chris Kloeris
Executive Director
Texas Optometry Board
Filed: November 18, 2010

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The Texas Optometry Board files this notice of intention to review Texas Administrative Code, Title 22, Chapter 273, pursuant to the requirements of Texas Government Code §2001.039. This section requires all state agencies to review their rules every four years. After an assessment that the reasons for initially adopting the rules continue to exist, the agency's rules may be considered for readoption.

The agency has conducted a preliminary assessment of the following rules in Chapter 273 and has determined that the reasons for initially adopting the rules continue to exist: §273.1, Surrender of License; §273.2, Use of Name of Retired or Deceased Optometrist; §273.3, Contact Lenses as Prize or Premium; §273.4, Fees (Not Refundable); §273.5, Limited License for Clinical Faculty; §273.6, Provisional License; §273.7, Inactive Licenses and Retired License for Volunteer Charity Care; §273.8, Renewal of License; §273.9, Public Interest Information; §273.10, Licensee Compliance with Payment Obligations; §273.11, Public Participation in Meetings; §273.12, Profile Information; and §273.13, Contract or Employment with Community Health Centers.

The agency is reviewing §273.4 as adopted by the agency on November 5, 2010 and published in the November 19, 2010, issue of the *Texas Register* (35 TexReg 10232).

The agency invites comments from the public regarding whether the reasons for initially adopting these rules continue to exist. Comments on the proposal may be submitted to Chris Kloeris, Executive Director, Texas Optometry Board, 333 Guadalupe Street, Suite 2-420, Austin, Texas 78701-3942. The deadline for furnishing comments is thirty days after publication in the *Texas Register.*

TRD-201006586
Chris Kloeris
Executive Director
Texas Optometry Board
Filed: November 18, 2010

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The Texas Optometry Board files this notice of intention to review Texas Administrative Code, Title 22, Chapter 275, pursuant to the re-

quirements of Texas Government Code §2001.039. This section requires all state agencies to review their rules every four years. After an assessment that the reasons for initially adopting the rules continue to exist, the agency's rules may be considered for readoption.

The agency has conducted a preliminary assessment of the following rules in Chapter 275 and has determined that the reasons for initially adopting the rules continue to exist: §275.1, General Requirements, and §275.2, Required Education.

The agency invites comments from the public regarding whether the reasons for initially adopting these rules continue to exist. Comments on the proposal may be submitted to Chris Kloeris, Executive Director, Texas Optometry Board, 333 Guadalupe Street, Suite 2-420, Austin, Texas 78701-3942. The deadline for furnishing comments is thirty days after publication in the *Texas Register.*

TRD-201006587
Chris Kloeris
Executive Director
Texas Optometry Board
Filed: November 18, 2010

TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 43 TAC §21.188

Wind Load Pressure in Pounds per Square Foot

Height, in feet above ground, as measured above the average level of the ground adjacent to the structure	Pressure, pounds per square foot
0 - 5	0
6 - 30	20
31 - 50	25
51 - 99	35
100 - 199	45
200 - 299	50
300 - 399	55
400 - 500	60
501 - 800	70
Over 800	77

Figure: 43 TAC §21.431

Wind Load Pressure in Pounds per Square Foot

Height, in feet above ground, as measured above the average level of the ground adjacent to the structure	Pressure, pounds per square foot
0 - 5	0
6 - 30	20
31 - 50	25
51 - 99	35
100 - 199	45
200 - 299	50
300 - 399	55
400 - 500	60
501 - 800	70
Over 800	77

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Office of the Attorney General

Proposed Settlement of a Claim for Natural Resource Damages

The State of Texas hereby gives notice of the proposed resolution of an environmental claim for natural resource damages. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed settlement if the comments disclose facts or consideration that indicate that the consent is inappropriate, improper, inadequate or inconsistent with the requirements of the Law.

Case Title and Court: *In re Tronox Incorporated, et al.*, Case No. 09-10156 (ALG) in the United States Bankruptcy Court for the Southern District of New York.

Background: The State of Texas Natural Resource Damage Trustees filed claims in the above bankruptcy for natural resource damages in Waggoner, Days, and Howard Creeks caused by the operations of Tronox and its predecessor - Kerr-McGee Chemical Corporation - at a facility in Texarkana, Bowie County, Texas. A portion of the claim filed by the State of Texas Natural Resource Damage Trustees was filed jointly with the United States Department of Interior (DOI).

Nature of Settlement: The proposed settlement agreement provides for the State of Texas Trustees to receive approximately $484,000.00 in cash. Additionally, the proposed settlement agreement provides for the State of Texas Trustees to receive approximately 0.46% of any net recovery from a litigation trust set up to pursue claims against Kerr McGee's successor Anadarko. Portions of monies received will be jointly administered by the State of Texas Trustees and the DOI.

The Office of the Attorney General will accept written comments relating to this proposed judgment for thirty (30) days from the date of the publication of this notice. Copies of the proposed judgment may be examined at the Office of the Attorney General, 300 W. 15th Street, 10th Floor, Austin, Texas. A copy of the proposed consent decree and environmental settlement agreement (proposed decree) may also be obtained in person or by mail at the above address for the cost of copying. Requests for copies of the proposed decree and written comments on the proposed decree should be directed to Sarah Jane Utley, Assistant Attorney General, Office of the Texas Attorney General, P.O. Box 12548, Austin, Texas 78711-2548, (512) 463-2012, facsimile (512) 320-0911.

For information regarding this publication, contact Zindia Thomas, Agency Liaison, at (512) 936-9901.

TRD-201006588
Jay Dyer
Deputy Attorney General
Office of the Attorney General
Filed: November 18, 2010

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Office of the Governor

Request for Grant Applications for the Juvenile Accountability Block Grant Discretionary Program

The Criminal Justice Division (CJD) of the Governor's Office is soliciting discretionary applications for projects that promote greater accountability in the juvenile justice system for the state fiscal year 2012 grant cycle.

Purpose: The purpose of the Juvenile Accountability Block Grant Discretionary (JABG) Program is to reduce juvenile offending through accountability-based programs focused on the juvenile offender and the juvenile justice system.

Available Funding: Federal funds are authorized under the Omnibus Crime Control and Safe Streets Act of 2002, Public Law 107-273, 42 U.S.C. 3796 et seq. All grants awarded from this fund must comply with the requirements contained therein. All awards are subject to the availability of appropriated funds and any modifications or additional requirements that may be imposed by law.

Funding Levels: Minimum grant award - $5,000

Required Match: Grantees must provide matching funds of at least ten percent (10%) of total project expenditures. This requirement must be met through cash contributions.

Standards: Grantees must comply with the standards applicable to this funding source contained in the *Texas Administrative Code*, Title 1, Part 1, Chapter 3 (1 TAC Chapter 3) and the requirements of the federal statutes that authorize this funding.

Prohibitions: Grant funds may not be used to support the following services, activities, and costs:

(1) proselytizing or sectarian worship;

(2) lobbying;

(3) any portion of the salary of, or any other compensation for, an elected or appointed government official, except in the case of a juvenile court or drug court;

(4) transportation, lodging, per diem or any related costs for participants, when grant funds are used to develop and conduct training;

(5) vehicles or equipment for government agencies that are for general agency use;

(6) weapons, ammunition, explosives or military vehicles;

(7) admission fees or tickets to any amusement park, recreational activity or sporting event;

(8) promotional gifts;

(9) food, meals, beverages, or other refreshments unless the expense is for a working event where full participation by participants mandates the provision of food and beverages and the event is not related to amusement or social activities in any way;

(10) membership dues for individuals;

(11) any expense or service that is readily available at no cost to the grant project or that is provided by other federal, state or local funds (i.e., supplanting);

(12) fundraising;

(13) medical services; and

(14) construction.

Eligible Applicants:

(1) State agencies;

(2) Units of local government including crime control and prevention districts; and

(3) Native American Tribal Governments.

Requirements:

(1) Projects must address one or more of the following JABG Purpose Areas:

(a) **Juvenile Drug Courts:** This solicitation invites communities to propose the implementation of a juvenile drug court program, using best practices in substance abuse treatment.

Project Period: Grant-funded projects must begin on or after September 1, 2011, and will expire on or before August 31, 2012.

Application Process: Applicants must access CJD's grant management website at https://egrants.governor.state.tx.us to register and apply for funding.

Preferences: Preference will be given to those applicants that demonstrate cost effective programs focused on proven or promising approaches to service provision.

Closing Date for Receipt of Applications: All applications must be certified via CJD's grant management website on or before January 31, 2011.

Selection Process: For state discretionary projects, applications are reviewed by CJD staff members or a review group selected by the executive director. CJD will make all final funding decisions based on eligibility, reasonableness, availability of funding, and cost effectiveness.

Contact Person: If additional information is needed, contact the eGrants Help Desk at egrants@governor.state.tx.us or (512) 463-1919.

TRD-201006620
David Zimmerman
Assistant General Counsel
Office of the Governor
Filed: November 19, 2010

♦ ♦ ♦

Texas Health and Human Services Commission

Request for Public Comment

Methodology for Determining Caseload Reduction Credit for the Temporary Assistance for Needy Families (TANF) Program for Federal Fiscal Year 2011

The Texas Health and Human Services Commission (HHSC) is seeking comments from the public on its estimate and methodology for determining the Temporary Assistance for Needy Families (TANF) Program caseload reduction credit for Federal Fiscal Year (FFY) 2011. HHSC will base the methodology on caseload reduction occurring from FFY 2005 to FFY 2010. This methodology and the resulting estimated caseload reduction credit will be submitted to the U.S. Department of Health and Human Services, Administration for Children and Families, for approval.

Under Section 407(b)(3) of the Social Security Act and Title 45 of the Code of Federal Regulations, Part 261, Subpart D, any State wishing to receive a TANF caseload reduction credit must complete and submit a report. The caseload reduction credit gives a State credit for reducing its TANF caseload between a base year and a comparison year. The State must develop a methodology for determining the TANF caseload reduction credit, which will be used to calculate the estimate. The State must provide the public with an opportunity to comment on the estimate and methodology. As the state agency that administers the TANF program, HHSC has developed the estimate and methodology and is providing the public with an opportunity for comment.

The methodology and the estimated caseload reduction credit will be posted on the HHSC website at http://www.hhsc.state.tx.us/research by December 3, 2010. Written or electronic copies of the methodology and estimate also can be obtained by contacting Ross McDonald, HHSC Texas Works Reporting Team Lead, by telephone at (512) 424-6843.

The public comment period begins December 3, 2010, and ends December 17, 2010. Comments must be submitted in writing to Texas Health and Human Services Commission, Strategic Decision Support, Attention: Ross McDonald, MC 1950, P.O. Box 13247, Austin, Texas 78711-3247. Comments also may be submitted electronically to Ross McDonald at ross.mcdonald@hhsc.state.tx.us.

TRD-201006662
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: November 19, 2010

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Texas Department of Licensing and Regulation

Vacancy on Advisory Board on Barbering

The Texas Department of Licensing and Regulation (Department) announces a vacancy on the Advisory Board on Barbering (Board) established by Texas Occupations Code, Chapter 1601. The pertinent rules may be found in 16 TAC §82.65. The purpose of the Advisory Board on Barbering is to advise the Texas Commission of Licensing and Regulation (Commission) and the Department on: education and curricula for applicants; the content of examinations; proposed rules and standards on technical issues related to barbering; and other issues affecting barbering.

The Board is composed of five members appointed by the presiding officer of the Commission, with the Commission's approval. The Board consists of two members who are engaged in the practice of barbering as a Class A barber and do not hold a barbershop permit; two members who are barbershop owners and hold barbershop permits; and one member who holds a permit to conduct or operate a barber school. Members serve staggered six-year terms, with the terms of one or two members expiring on the same date each odd-numbered year.

This announcement is for one position of a Class A barber who does not hold a barbershop permit.

Interested persons may download an application from the Texas Department of Licensing and Regulation's website at: www.license.state.tx.us. You may also request an application from the Department by fax at (512) 475-2874 or email advisory.boards@license.state.tx.us. Applicants may be asked to appear for an interview; however, any required travel for an interview would be at the applicant's expense.

TRD-201006598

William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Filed: November 18, 2010

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Texas Department of Public Safety

Award of Contract

Public Notice of the Texas Department of Public Safety's Contract Award (RFQ# 405-HQ10-0097A) for Deliverables Regarding TXDPS Policies and Procedures

Awarded Vendor: Public Agency Training Council, Legal and Liability Risk Management Institute, 5235 Decatur Blvd., Indianapolis, IN 46214.

Amount of Contract: $250,000.00.

Date for Completion: August 31, 2014.

Description of Work.

(a) Phase One.

(1) Study the current Texas Department of Public Safety (TXDPS) manuals to determine which TXDPS policies and procedures should be deleted from the manuals and inserted into one or more stand-alone law enforcement policies and procedures manuals. This phase will focus on policies and procedures regarding law enforcement functions which expose law enforcement agencies to the highest risk of liability, such as use of force. TXDPS currently has the following manuals:

(A) General Manual;

(B) Driver License Manual;

(C) Criminal Law Enforcement Manual;

(D) Texas Highway Patrol Manual; and

(E) Ranger Manual.

(2) Review the current policies and procedures to see if they are consistent with current best practices for United States law enforcement agencies.

(3) Recommend any changes to amend or replace any current TXDPS policies and procedures to bring such policies and procedures up to the level of best practices.

(4) Review the current TXDPS law enforcement functions to determine whether TXDPS policies and procedures exist to address the current TXDPS law enforcement functions.

(5) Recommend any other best practices policies and procedures regarding law enforcement functions which are not currently included in the existing TXDPS manuals.

(6) All recommendations in this phase shall be labeled as "Draft."

(7) Meet with the TXDPS management and the applicable TXDPS personnel to discuss the proposed recommendations.

(b) Phase Two.

(1) Meet with TXDPS management and the applicable TXDPS personnel for the TXDPS divisions to determine the following:

(A) Whether any of the proposed policies and procedures recommended in Phase One should be customized for TXDPS.

(B) The most useful and effective way of organizing the policies and procedures into a searchable hard-copy manual, as well as into a searchable electronic version of the manual, which can be programmed into a write-protected version.

(C) The most effective way of creating the hard-copy and a master copy of the electronic manual in a format that can be easily modified as policies and procedures change. In addition, the parties must determine the most effective document control method, so it is clear to the users which version of the materials they have in their possession.

(D) The most effective and useful index and table of contents that allows the user to quickly and easily find the relevant information.

(E) Whether certain divisions need their own policies and procedures manual(s) due to their unique law enforcement functions.

(F) If a certain division needs their own policies and procedures manual, what is the best way to organize the manual?

(2) Coordinate and cooperate with TXDPS and any TXDPS representatives or vendors, as requested by TXDPS, regarding any modifications to any proposed policies and procedures.

(3) Recommend the organization of such policies and procedures into one or more policies and procedures manuals for the applicable law enforcement divisions of TXDPS and deliver the source material to TXDPS in a format and manner that allows TXDPS to organize the material and to have someone create numerous copies of the policies and procedures.

(4) TXDPS will then determine which policies and procedures it will adopt and how to organize such policies and procedures into one or more manuals.

(c) Phase Three.

(1) Develop hard-copy and electronic training manuals and presentation materials to train TXDPS personnel on the adopted policies and procedures.

(A) The manuals and materials must be created in a modular fashion, so that the manuals and materials can be easily presented in a logical fashion that covers all of the topics, as well as in a piecemeal fashion so TXDPS can present a topic in a stand-alone fashion.

(B) The manuals and materials must be easy to search and must contain effective tables of contents and indexes.

(C) The manuals and materials must include, where applicable, scenarios to illustrate policies and procedures.

(D) The manuals and materials must be organized in a manner and format that can be easily modified as policies and procedures change. Such manuals and materials must be labeled in a manner so that it is clear to the users which version of the manuals and materials they have in their possession.

(E) Once the TXDPS project director approves the final draft of the training manuals and presentation materials, the vendor must deliver five (5) printed copies of the hard-copy training manuals and two (2) electronic versions of the training manuals in the format of the TXDPS project director's choice.

(2) TXDPS intends to train its own personnel; however, TXDPS reserves the right under this procurement to enter into a Statement of Work with the selected vendor to provide the following during the term of the awarded contract, if any:

(A) Train-the-trainer training.

(B) Recorded audio and/or video training of all or part of the training manuals and presentation materials.

(C) Live training at one or more physical locations throughout the State of Texas, which TXDPS can record for subsequent use.

(d) Phase Four.

(1) TXDPS intends to modify and update the deliverables from the prior phases.

(2) TXDPS reserves the right under this procurement to enter into a Statement of Work with the selected vendor to provide the following during the term of the awarded contract, if any:

(A) Modify the deliverables from any of the prior phases.

(B) Repeat all or part of the prior phases. For example, TXDPS may be tasked with additional law enforcement functions in the future or technological developments may change the way law enforcement functions are carried out in the future, necessitating new or updated policies, procedures, and training.

(C) Expand the scope of a prior deliverable.

(D) Implement any recommendations.

(E) Serve as a consulting or testifying expert for the purposes of litigation. Regardless of whether TXDPS or the Attorney General for the State of Texas retains the selected vendor as a consulting or testifying expert for the purposes of litigation, the selected vendor must not testify against (or otherwise use or assist others to use the information vendor obtains under this contract against) TXDPS or the State of Texas in any legal proceeding regarding any of the issues within the scope of any deliverables the vendor provides to TXDPS under this contract, unless such testimony relates to any TXDPS breach of contract.

(3) Printing services are out of scope for this procurement.

(4) The selected vendor must comply with the following general requirements throughout the duration of the awarded contract, if any:

(A) Include the following disclaimer on all deliverables: "These deliverables are not a substitute for the advice of an attorney."

(B) Refrain from labeling the deliverables as the vendor's copyrighted material or otherwise labeling the deliverables as being the vendor's property or the property of any person or entity other than TXDPS.

(C) Brief the TXDPS project director and TXDPS management, upon request, regarding the status of the deliverables.

(D) Name a project director to act as the primary point of contact with TXDPS. The project director will work closely with TXDPS to ensure that requirements are met. The project director will:

(i) Monitor the project schedule and revise as needed;

(ii) Be responsible for managing the project implementation;

(iii) Oversee subcontractor responsibilities, if applicable; and

(iv) Coordinate closely with the TXDPS project director.

TRD-201006646
Duncan R. Fox
Interim General Counsel
Texas Department of Public Safety
Filed: November 19, 2010

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Public Utility Commission of Texas

Extending Comment Period in Rulemaking Project Number 38675 - Amendments to Customer Protection Rules Relating to Prepaid Service

The comment period for Project Number 38675, *Amendments to Customer Protection Rules Relating to Prepaid Service*, has been extended. Comments will now be due on December 6, 2010 and reply comments are due December 13, 2010.

If you wish to file comments, please file the requested number of copies, as indicated in the publication, with the Commission's filing clerk.

If you have any questions please contact Rebecca Reed at (512) 936-7371, rebecca.reed@puc.state.tx.us. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Project Number 38675.

TRD-201006638
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 19, 2010

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Notice of Application for a Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on November 17, 2010, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of Mosaic Networx LLC for a Service Provider Certificate of Operating Authority, Docket Number 38904.

Applicant intends to provide data-only, facilities-based and resale telecommunications services.

Applicant's requested SPCOA geographic area includes the entire state of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than December 10, 2010. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 38904.

TRD-201006633
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 19, 2010

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Notice of Application for Waiver from Requirements in P.U.C. Substantive Rule §26.202

Notice is given to the public of an application filed on November 8, 2010, with the Public Utility Commission of Texas (commission) for waiver from the requirements in P.U.C. Substantive Rule §26.202.

Docket Style and Number: Application of Big Bend Telephone Company, Inc. for a Waiver of Requirements in P.U.C. Substantive Rule §26.202. Docket Number 38902.

The Application: Big Bend Telephone Company, Inc. (Big Bend) asserts that the requirements in P.U.C. Substantive Rule §26.202 are no longer applicable nor appropriate due to the Texas Legislature's repeal of §53.202 of the Public Utility Regulatory Act (PURA) upon which

P.U.C. Substantive Rule §26.202 was based. The applicant stated its belief that the requirements of the rule are no longer mandated by PURA and that, until the commission repeals P.U.C. Substantive Rule §26.202, the commission should grant good cause waivers from such rule, pursuant to P.U.C. Procedural Rule §22.5.

Persons wishing to comment on the action sought or intervene should contact the Public Utility Commission of Texas by December 10, 2010, at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) (800) 735-2989. All comments should reference Docket Number 38902.

TRD-201006582
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 17, 2010

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Request for Comments on Transmission Projects and Costs in the Southwest Power Pool

The Public Utility Commission of Texas (commission) requests comments in response to the questions below. Project Number 38906, *PUC Proceeding on Transmission Projects and Costs in the Southwest Power Pool*, has been established for this proceeding.

1. Transmission Costs

a. What authority does the commission and the Southwest Power Pool (SPP) have to hold down costs after initial estimates are made for transmission projects approved by the SPP?

b. What actions should the commission or SPP take to hold down costs after initial estimates are made for transmission projects approved by the SPP?

2. Assignment of Transmission Projects

Under SPP rules, an incumbent utility is assigned to build a transmission project if the project is within its service territory. SPP rules also allow the utility to assign the project to a third party if it so chooses.

a. What authority does the commission and SPP have to ensure that any such assignment produces a result that is in the public interest?

b. What actions should the commission or SPP take to ensure that any such assignment produces a result that is in the public interest?

Information concerning this project is contained in a memorandum from commission chairman Barry T. Smitherman filed on November 9, 2010. The memorandum can be found on the commission's Interchange (http://www.puc.state.tx.us/interchange/index.cfm) under Project Number 37830.

Comments may be filed by submitting 16 copies to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, Austin, Texas 78711-3326. Initial comments may be submitted within 17 days after publication (December 20, 2010) and reply comments may be submitted within 25 days after publication (December 28, 2010). All comments should reference Project Number 38906.

Questions concerning Project Number 38906 should be directed to Richard Greffe, Competitive Markets Division, at (512) 936-7405 or Margaret Pemberton, Legal Division, at (512) 936-7232. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7290.

TRD-201006632
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 19, 2010

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Supreme Court of Texas

(Editor's note: In accordance with Texas Government Code, §2002.014, which permits the omission of material which is "cumbersome, expensive, or otherwise inexpedient," Exhibit A and Exhibit B are not included in the print version of the Texas Register. The report is available in the on-line version of the December 3, 2010, issue of the Texas Register.)

Approval of Referendum on Proposed Amendments to the Texas Disciplinary Rules of Professional Conduct

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 10-9190

APPROVAL OF REFERENDUM ON PROPOSED AMENDMENTS TO THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

WHEREAS:

1. On October 20, 2009, in Misc. Docket No. 09-9175, the Supreme Court of Texas proposed amendments to the Texas Disciplinary Rules of Professional Conduct and invited public comments through December 31, 2009. The Court received numerous comments in response.

2. As a result of comments received, the Court made revisions to the proposed rules. The Court sent the revised version of the proposed rules to the State Bar of Texas Board of Directors on April 14, 2010, with a request that the Board consider the revised version of the proposed rules and, by October 6, 2010, provide the Court with recommendations or comments.

3. On July 7, 2010, the Court sent the revised version of the proposed rules, accompanied by proposed interpretive comments, to the Board and again requested that the Board provide the Court with any feedback regarding the proposed rules and interpretive comments by October 6, 2010.

4. From August 30 through September 10, 2010, the Board conducted public-education hearings in Lubbock, El Paso, Houston, Tyler, Dallas, Corpus Christi, McAllen, San Antonio, and Austin to obtain feedback from lawyers and members of the public regarding the proposed rules and interpretive comments. The Board also invited feedback on the State Bar's website.

5. As a result of feedback received, the Board suggested revisions to the proposed rules and interpretive comments. The Board approved the modified version of the proposed rules and comments in public meetings on October 1 and November 5, 2010. The Board also petitioned the Court to submit the proposed rules to State Bar members for a referendum between January 15 and February 14, 2011, by electronically transmitted and paper ballots in a form attached to the petition.

6. The Court has considered the Board's petition and concluded that the proposed amendments to the Texas Disciplinary Rules of Professional Conduct, as provided in Exhibit A (in clean form) and B (in redlined form comparing the proposed rules with the existing rules) to this Order, should be submitted to State Bar members for a referendum between January 18 and February 17, 2011, using electronically transmitted and paper ballots in the form attached to this Order.

7. The Court's approval of this referendum is not a predetermination of any legal issues regarding the proposed rules.

IT IS THEREFORE ORDERED THAT:

1. The State Bar of Texas is directed to conduct a referendum on the attached, proposed amendments to the Texas Disciplinary Rules of Professional Conduct. The referendum must be on the proposed rules in Exhibits A (clean) and B (redlined), not on the proposed interpretive comments in Exhibit A. The interpretive comments are included in this Order to serve solely as guidance for individuals who vote on or otherwise consider the proposed rules.

2. The State Bar of Texas is directed further to conduct the referendum as follows:

a. Online voting must begin on January 18, 2011, at 8:00 a.m., and end on February 17, 2011, at 5:00 p.m.

b. On January 18, 2011, a written ballot must be sent to each State Bar of Texas member who is registered and eligible to vote in the referendum.

c. No ballot received by the State Bar of Texas after 5:00 p.m. on February 17, 2011 will count.

d. The ballot must be substantively in the form attached to this Order.

3. The Clerk of the Supreme Court of Texas is directed to:

a. submit a copy of this Order for publication in the *Texas Register;*

b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal;* and

c. cause a copy of this Order to be posted on the website of the Supreme Court of Texas at http://www.supreme.courts.state.tx.us/.

ENTERED this 16th day of November, 2010.

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Wallace B. Jefferson, Chief Justice

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Nathan L. Hecht, Justice

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Dale Wainwright, Justice

_____

David M. Medina, Justice

_____

Paul W. Green, Justice

_____

Phil Johnson, Justice

_____

Don R. Willett, Justice

_____

Eva M. Guzman, Justice

_____

Debra H. Lehrmann, Justice

FORM OF BALLOT

A. Terminology, Competent and Diligent Representation, Scope of Representation and Allocation of Authority, Communication, Fees, Confidentiality, Safekeeping Property, and Declining or Terminating Representation:

Do you favor the adoption of Proposed Rules 1.00–1.05 and 1.15–1.16 of the Texas Disciplinary Rules of Professional Conduct, as published in the December 2010 issue of the *Texas Bar Journal*?

☐ YES ☐ NO

B. Conflicts of Interest: Multiple Clients in the Same Matter:

Do you favor the adoption of Proposed Rule 1.07 of the Texas Disciplinary Rules of Professional Conduct, as published in the December 2010 issue of the *Texas Bar Journal*?

☐ YES ☐ NO

C. Other Conflicts of Interest:

Do you favor the adoption of Proposed Rules 1.06 and 1.08–1.12 of the Texas Disciplinary Rules of Professional Conduct, as published in the December 2010 issue of the *Texas Bar Journal*?

☐ YES ☐ NO

D. Prohibited Sexual Relations, Diminished Capacity, and Prospective Clients:

Do you favor the adoption of new Proposed Rules 1.13, 1.14, and 1.17 of the Texas Disciplinary Rules of Professional Conduct, as published in the December 2010 issue of the *Texas Bar Journal*?

☐ YES ☐ NO

E. Advocate, Law Firms and Associations, Public Service, and Maintaining the Integrity of the Profession:

Do you favor the adoption of Proposed Rules 3.01–3.10, 5.01–5.07, 6.01–6.03, and 8.01–8.05 of the Texas Disciplinary Rules of Professional Conduct, as published in the December 2010 issue of the *Texas Bar Journal*?

☐ YES ☐ NO

F. Counselor, Non-Client Relationship, Information About Legal Services, and Severability of Rules:

Do you favor the adoption of Proposed Rules 2.01–2.02, 4.01–4.04, 7.01–7.07, and 9.01 of the Texas Disciplinary Rules of Professional Conduct, as published in the December 2010 issue of the *Texas Bar Journal*?

☐ YES ☐ NO

A copy of the proposed Texas Disciplinary Rules of Professional Conduct can be found online at www.texasbar.com/rulesupdate

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TRD-201006599
Kennon Peterson
Rules Attorney
Supreme Court of Texas
Filed: November 18, 2010

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How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 35 (2010) is cited as follows: 35 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "35 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 35 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online at: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the internet. For website information, call the Texas Register at (512) 463-5561.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac.

The following companies also provide complete copies of the TAC: Lexis-Nexis (800-356-6548), and West Publishing Company (800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Index of Rules***. The *Index of Rules* is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register***. If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with the ***Texas Register*** page number and a notation indicating the type of filing (emergency, proposed, withdrawn, or adopted) as shown in the following example.

TITLE 1. ADMINISTRATION
Part 4. Office of the Secretary of State
Chapter 91. Texas Register
40 TAC §3.704.....950 *(P)*